UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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DOCKETED 03/16/05

COMMISSIONERS

SERVED 03/16/05

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Peter B. Lyons
Gregory B. Jaczko

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

ORDER

CLI-05-08

On January 5, 2005, we issued CLI-05-01, requiring Private Fuel Storage (PFS) to submit proposed redactions to three Commission orders (CLI-04-10, CLI-04-27, and CLI-05-01). On February 4th, PFS submitted 58 proposed redactions, and on February 8th, the State of Utah filed objections to four of those redactions. For the reasons given in the appendix to today's decision, we do not agree with Utah that we should make publicly available the information found in those four redactions. The information at issue relates to the details of PFS's cost-passthrough arrangements, and we believe its release would compromise PFS's legitimate competitive concerns. We make the appendix available to the parties but not to the public because it discusses proprietary information.

Accordingly, we:

(1) *Reject* Utah's objections to four of PFS's 58 proposed redactions to CLI-04-10, CLI-04-27 and CLI-05-01;

(2) *Approve* all of PFS's proposed redactions to those three Memoranda and Orders;

(3) *Instruct* SECY to release to the public the redacted versions of those three Memoranda and Orders, all of which are appended hereto. SECY shall ensure that these redacted versions are available to the public both in the appropriate Public Reading Rooms and on our Agencywide Documents Access and Management System (ADAMS); and

(4) Further *instruct* SECY to release this Order to the public but to withhold from the public the Appendix to this Order.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission

Dated at Rockville, MD
this 16th day of March, 2005.

REDACTED VERSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-04-10

MEMORANDUM AND ORDER
(Original Version Contains Proprietary Information)

Private Fuel Storage, L.L.C. (PFS) and the State of Utah have filed cross petitions for review of Licensing Board decisions concerning financial qualifications and decommissioning funding. PFS seeks review of one order--the Licensing Board's January 5, 2004 Memorandum and Order Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions (unpublished) ("Reconsideration Ruling"). Utah seeks review of several related orders--the Board's May 27, 2003 Partial Initial Decision (Contention Utah E/Confederated Tribes F, Financial Assurance) ("PID-E"), its May 27, 2003 Partial Initial Decision (Utah S, Decommissioning) ("PID-S"), its May 27, 2003 Memorandum and Order

REDACTED VERSION

(Rulings on Summary Disposition Motion and Other Filings Relating to Remand From CLI-00-13) ("MSA Ruling"), and its January 5, 2004 Reconsideration Ruling.[1]

The Commission has full discretion whether to undertake appellate review of its licensing boards' merits decisions. NRC rules say that the Commission may grant review of initial Board decisions (or partial initial decisions) based on "any consideration" it "deems to be in the public interest."[2] Review is particularly appropriate where the Board's ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider.[3]

For the reasons set forth below, we grant review of PFS's claims concerning whether PFS must have service contracts in place to cover O&M costs for 1000 casks prior to beginning operations and whether those contracts must be in a specific dollar amount. We deny review of the issues raised in Utah's petition.

I. BACKGROUND

The petitions for review concern Utah Contention E/Confederated Tribes F, raising the question whether PFS has provided reasonable assurance of being able to cover its costs of

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[1]This series of Board decisions remains unpublished because of as yet unresolved questions of proprietary information and confidentiality.

[2]*See* 10 C.F.R. § 2.786(b)(4); *see generally Private Fuel Storage, L.L.C.*, CLI-04-4, 59 NRC __ (2004), slip op. at 1-2. Throughout this decision we refer to the provisions of our former Part 2, which applies to this proceeding. Effective February 14, 2004, we have changed Part 2 in significant respects. *See Changes to Adjudicatory Process; Final Rule*, 60 Fed. Reg. 2182 (Jan. 14, 2004).

[3]*See* 10 C.F.R. § 2.786(b)(4).

operating and maintaining its proposed facility, and Utah Contention S, raising the question whether PFS will have adequate decommissioning funding.[4]

In a March 2000 decision in response to a PFS motion for summary disposition of Utah E, the Board found that only two issues should proceed to hearing: the accuracy of PFS's operation and maintenance cost estimate, and the adequacy of its onsite liability insurance coverage.[5] The Board found that two license conditions proposed by the NRC staff provided reasonable financial assurance. The first required that PFS have enough funds committed to construct the entire first phase of the project prior to beginning any construction, and the second required that it have service contracts in place to cover operational, maintenance and decommissioning costs prior to accepting spent fuel for storage. The Board referred to the Commission its ruling that these conditions provided reasonable financial assurance. In CLI-00-13, the Commission affirmed the Board's ruling, thus approving the concept of service agreements as a means to show financial assurance. But the Commission required PFS, on remand, to produce a model service agreement for the Board's review so that Utah could raise (and litigate) any deficiencies in the agreement's terms.[6]

On remand, the Board issued a decision finding the model service agreement adequate despite a series of Utah challenges.[7] The Board also found that PFS had met its burden to

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[4] *See* 10 C.F.R. §72.22(e).

[5] *See* LBP-00-6, 51 NRC 101 (2000).

[6] CLI-00-13, 52 NRC at 35.

[7] *See* MSA Ruling, slip op. at 80-81.

show reasonable assurance of adequate financing.[8] Finally, the Board required PFS, prior to operation, to have in place sufficient service contracts to fund the estimated operating costs of a full-size, 4000-cask facility.[9] On reconsideration, the Board relaxed the initial funded capacity to 1000 casks.[10]

Much earlier, in June, 2000--before the Commission had issued CLI-00-13--the Board had held hearings on estimated costs of operation, maintenance, decommissioning and liability insurance. At the time of the June 2000 hearings, PFS had in place a financing plan quite different from the one that emerged later in connection with litigation over the model service agreement.

The original PFS plan called for the customer to pay a "base storage fee," divided into three lump sum payments, and annual storage fees.[11] The lump sums would cover construction, canister and other up-front costs. Under PFS's current plan, the only sum certain the customer is obligated to pay is a nonrefundable **xxxxxxxx** "commitment fee" upon signing.[12] In addition to the commitment fee, to cover construction costs, PFS's new scheme calls for its customers to **xxxxxxxxxx** in the amount of **xxxxxxxxx** per kilogram of uranium in "reserved capacity," the amount of fuel the customer plans to store.[13] **xxxxxxxxxxx.**

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[8] *See* PID-E, slip op. at 101-102.

[9] *See* PID-E, slip op. at 87; 95.

[10] *See* Reconsideration Ruling, slip op. at 16-17.

[11] For a comparison of previous funding scheme versus PFS's new plan, *see* MSA Decision, slip op. at 5-13.

[12] *Id*.

[13] *See id.* at 7-8.

The new plan calls for customers to pay estimated annual operation and maintenance costs up-front on a quarterly basis.[14] At the end of each year, the customer is either billed or credited to reflect the difference between the estimated and actual costs. Whereas the previous plan called for canister and cask costs to come out of a second lump sum payment to PFS, now the plan calls for the customers to own the casks and canisters and pay the vendors directly. Upon shipping a cask, the customer pays its allocated portion of decommissioning costs.[15]

In November 2000, Utah voiced various objections to the new financing plan and moved to reopen the record in the June evidentiary hearings. The Board ultimately refused to reopen the record, finding that the changes in PFS's financing scheme and Utah's objections to it would not "materially alter the result" of the hearing, as required for reopening a hearing record.[16] The Board agreed with PFS's argument that the subject of the June hearings was cost estimates only.[17] The Board noted that Utah had not filed any late-filed contention in light of PFS's changed financial plan, but rested on its previous contention.[18] None of Utah's concerns about the new financing plan fell within the scope of the hearings or would alter the result, the Board concluded.[19]

Before us today is Utah's challenge to the Board's decision, its challenge to the Board's approval of the model service agreement, and its challenge to the Board's overall financial

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[14] *Id.* at 8.

[15] *Id.* at 9.

[16] 10 C.F.R. §2.734(a).

[17] MSA Ruling, slip op. at 78-80.

[18] *See* id. at 57, n. 7.

[19] *Id.* at 80.

assurance holding. Also before us are PFS's claims that the Board imposed unnecessarily restrictive financial conditions on operating the proposed PFS facility.

II. DISCUSSION

A. PFS Petition for Review

PFS requests review of the Board's requirements that (1) a specific dollar amount of projected O&M costs must be covered by customer service agreements in order to satisfy the license conditions the Commission approved in CLI-00-13, and (2) PFS have customer service agreements in place to cover the full O&M costs of at least a 10,000 MTU (1000 cask) facility prior to beginning operations.

1. "Specific Dollar Amount" Requirement

PFS argues that it need not have agreements in a specific dollar amount because it intends to use "passthrough" contracts wherein the customer agrees to pay for all associated O&M costs, similar to the contracts approved by the Commission a few years ago in a license transfer case*, Northern States Power Co.* (Monticello Nuclear Generating Plant).[20] On reconsideration, the Board rejected this argument because the Commission in CLI-00-13 had explicitly provided that PFS should have contracts in place to cover costs in an "amount to be determined at a hearing."[21] The Board noted that the Commission's directive in CLI-00-13 requiring contracts for specific amounts predated the MSA cost passthrough scheme, but said:

[20]CLI-00-14, 52 NRC 37 (2000) (order issued the same day as CLI-00-13) .

[21]*See* Reconsideration Ruling, slip op. at 12; *see also* CLI-00-13, 52 NRC at 36.

"to the extent PFS now considers that mechanism a basis for negating the Commission's directive, this seems a matter best taken up with the Commission."[22]

The NRC staff opposes review of the "specific dollar amount" issue. The staff agrees with the Board that the Commission's order in CLI-00-13 called for contracts in a specific dollar amount, as determined by the Board after a hearing. It argues that PFS should have asked the Commission to revise its directive, rather than asking the Board to change its ruling on a motion for reconsideration. The staff also notes various differences between PFS's situation and that of Nuclear Management, the power plant operators whose passthrough contracts the Commission found adequate in the *Monticello* case.[23] For example, the staff says, in *Monticello*, Nuclear Management's sole customer was an electric utility with rate-backed revenues. Finally, the staff argued that PFS "never sought to eliminate consideration of its cost estimates and prices as a basis for demonstrating financial assurances."[24] Utah opposes the PFS position on similar grounds.

But the differences or similarities between the PFS plan and the situation in the *Monticello* case may prove irrelevant. The Board found that the model service agreement provides reasonable financial assurance, even though the executed contracts would not provide

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[22]MSA Ruling at 13, n. 9.

[23]*See* "NRC Staff's Response to 'Applicant's Petition for Review of Memorandum and Order Granting and Denying in Part Motion for Reconsideration And/Or Clarification of Financial Qualification Decisions,'" at 7-8.

[24]Two years elapsed between the hearings on cost estimates and the Board's decisions on financial assurance, during which time PFS developed its new financing plan. It is not clear, however, that using "passthrough" contracts would eliminate the need to estimate the costs of the facility. NRC regulations require that the licensee provide reasonable assurance that it will be able to cover "estimated costs." 10 C.F.R. §72.22(e). This suggests that a cost estimate would be necessary regardless of the type of billing method in the service contracts.

for a specific sum but would be passthrough contracts. If the Board's decision stands as it is, the service agreements may have to be redrafted.[25]

The PFS petition for review and the responses do not adequately clarify the seeming contradiction between approving the passthrough contracts–which apparently lack specific dollar amounts–and requiring contracts for a specific sum as a condition of operation. Hence, we have decided to grant PFS's petition for review in the expectation that full briefing will shed light on the matter.

2. O&M for Initial Capacity Facility of 1000 Units.

PFS also contests the Board's finding that it must have service agreements in place to cover O&M costs and decommissioning costs sufficient for a 1000 unit facility prior to beginning operations.[26] PFS's application is for a facility holding up to 4000 units. PFS points out, though, that it has always planned to build the facility in stages.

The Board initially held that PFS must have service contracts in place to cover the full amount of estimated operating, maintenance and decommissioning costs for a 4000-unit facility.[27] PFS's reconsideration motion argued that it always planned to build in stages, and that in CLI-00-13, the Commission did not require O&M funding for a 4000 unit facility prior to commencing operations. On reconsideration, the Board decided to require full O&M funding for

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[25]It is possible that the Board meant that **xxxxxxxxx**, as provided in the MSAs, must equal 1/120 of the Board's estimated costs (20 years times 4 quarters), but that is not clear from the decisions.

[26]*See* Reconsideration Ruling, slip op. at 16-17.

[27]PID-E at 101-102.

a 1000 unit facility.[28] The Board chose this figure because the record was "replete" with references to a 1000 unit initial capacity facility.[29]

PFS objects to the 1000 unit figure, arguing that it never said it would start operations with as many as 1000 units. It wants to begin operations as soon as it has enough service contracts to cover fixed costs plus per unit costs, whatever that initial number of units will be.

The license conditions as originally proposed by the NRC staff in the SER, and as substantially approved by the Commission in CLI-00-13, required that prior to construction, PFS have full funding for *construction* of "a facility with the initial capacity as specified by PFS to NRC."[30] In CLI-00-13, the Commission also ordered that license conditions should require that operations would not begin until service contracts were in place to cover operational, maintenance and decommissioning costs, but did not refer to the "initial capacity." But the Board seemingly interpreted CLI-00-13 to require specifying a total dollar amount for which PFS must have commitments prior to commencing *operations*, which would in turn require the Board to pick a certain number of casks for startup.

There is a substantial practical difference between a license condition that requires full funding for *constructing* a facility of a certain capacity, and one that requires full funding sufficient to cover operations and decommissioning for that same number of casks. As long as the Board's estimates of fixed and per-unit costs is accurate, it seems reasonable that PFS could satisfy NRC's financial assurance regulations at the operational stage by having service

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[28]Reconsideration Ruling, slip op. at 18.

[29]*Id.* at 16-17.

[30](Emphasis added). CLI-00-13, 52 NRC at 27. The "initial capacity" was omitted from the SER as proprietary information.

contracts in place that cover both the fixed costs and the per-unit costs for each cask actually accepted.

The Board ruling requiring O&M funding for a specific facility size, therefore, arguably reflects a mistake of law or fact, perhaps deriving from ambiguities in our own opinion in CLI-00-13. We intend to examine this issue more closely upon receipt of full briefs. We therefore accept review of this issue.

B. Utah's Petition for Review

Before addressing the specific charges of error in Utah's petition for review, we offer a few general observations. In CLI-00-13, the Commission approved the use of license conditions, including customer service agreements, as a means of showing PFS's financial assurance. At the time, PFS proposed to use service contracts that would ensure that it has a dependable revenue stream to cover its costs of running the facility throughout the term of the license. CLI-00-13 approved the NRC staff's proposal to use license conditions to establish enforceable financial assurance commitments. The Commission also directed that PFS produce a model service contract for review by the Board.

The point of having the model service agreement supplied and reviewed by the Board was to give Utah and the NRC staff an opportunity to uncover legal weaknesses or loopholes in the model agreement that would permit a customer to walk away from its waste or leave PFS with costs that it could not recover from its clients. But to a great extent, Utah complains not of flaws in the contracts themselves, but argues that either (1) the terms of the contracts are so lopsided that no customer would enter them or (2) the customer would simply ignore its contractual obligations.

The first complaint is simply addressed: if a particular nuclear power plant operator does not agree to the terms of the model service agreement, that operator will not store spent fuel at the PFS facility. If PFS can find no customers willing to enter into the contracts, then the PFS facility will never commence operations, even if PFS obtains an NRC license. The second concern is completely speculative. All of PFS's potential customers are NRC licensees–many are rate-regulated utilities--and all have themselves previously undergone evaluations of their financial capability to operate their facilities safely, including waste storage. We reject Utah's suggestion that PFS must establish the creditworthiness of each and every potential customer prior to operations. It is enough that PFS's customers will have the ability and contractual obligation to pay. PFS cannot be expected to prove that all of its customers invariably will fulfill their financial commitments. There is always a risk in business that some customer may ignore its obligations and force its creditor into court. "The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected."[31]

Keeping these general observations in mind, we review each of the specific issues raised in Utah's petition.

1. PFS License Conditions Go Far Beyond Claiborne[32]

Utah argues that the Commission should look again at PFS's financing plan because it goes far beyond *Claiborne* and the Commission's previous assumptions about the PFS plan. Utah argues PFS has substantially revised its financial plan from what it was when the

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[31]*North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999).

[32]*Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997).

Commission initially approved the license condition concept. Specifically, PFS will have no capital contributions from its members, will seek no commercial loans, and will rely entirely on revenues from its customers for operating costs.

This argument appears to be an attempt to relitigate the Commission's prior approval of the service contract device as a means of establishing financial qualifications.

Utah's reliance on distinguishing PFS's plan from the license applicant's in *Claiborne* is inapposite. Financial assurance must be viewed on a case-by-case basis. A license applicant's financial plan reflects estimated construction and operating costs, revenue streams, etc., which will vary dramatically depending on the type of facility. Here, a storage facility is entirely different from the uranium enrichment facility at issue in *Claiborne.* Consequently, the financial mechanisms necessary to show financial assurance will undoubtedly differ.

While Utah attempts to point out various disparities between the PFS plan and LES's in *Claiborne*, it ignores the fact that many of the "weaknesses" of which it complains in its petition were present in the LES case. For example, Utah objects that PFS will have no commercial loans; but in *Claiborne*, at the time the Commission found LES financially qualified, no lender had committed to finance the project either.[33] As the Commission found, "the LES financial plan [was] not based on prelicensing funding commitments from either the LES partners or lending institutions." And just as PFS relies on what Utah styles "hypothetical customers," LES had no executed enrichment contracts in hand at the licensing phase.[34] Both LES and PFS relied primarily on their own commitments not to go forward with the project without the contracts in hand.

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[33] *Id.* at 304.

[34] *Id.*

In some respects, PFS's plan offers greater assurances than those present in *Claiborne*. For example, PFS plans to use service contracts covering the entire life of the license. In contrast, LES's "long-term service contracts" were of only five years' duration.[35] LES faced greater challenges meeting its operating expenses given the highly competitive world market for enriched uranium. PFS, on the other hand, has no competitors now or in the foreseeable future for private, away-from-reactor dry storage. Finally, LES never produced a model contract for scrutiny by the Board, staff and intervenor, as PFS has done.

While there no doubt are substantial differences between the LES plan and PFS's, the fundamental question is whether PFS's plan departs from governing regulations, the Commission's controlling order on financial qualifications (CLI-00-13), and sound financial sense. Utah cites no regulation the PFS plan violates, and no specific conflict with CLI-00-13. Further, Utah's argument that financial soundness requires PFS to have equity payments from members or commercial loans is fact-driven. The Board saw the record otherwise.[36] Utah has not shown that the Board erred in finding the plan adequate despite the full reliance on customer service contracts for funding.

2. Non-specificity of License Conditions

Utah claims that the license conditions should be made more specific to incorporate promises (1) to use the approved model service agreement, (2) to obtain insurance in the amount determined by the Board, and (3) to annually review decommissioning costs to ensure the adequacy of funding.

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[35] *Id.*

[36] *See e.g.*, MSA Ruling, slip op. at 22-23 (rejecting argument that PFS will have "no assets").

We held in an earlier decision in this proceeding that not all licensee commitments need to be reduced to license conditions in order to bind PFS.[37] Utah's complaints help to illustrate why this is true. The Commission's order in CLI-00-13 suffices to ensure that the service agreements actually entered by PFS depart in no material respect from the model service agreement. As we explained in CLI-00-13, minor variations may be acceptable, but we reasonably can leave to the NRC staff the task of monitoring the agreements and making sure that PFS lives up to its commitments.[38]

Utah wants incorporated as a license condition the Board's order that PFS obtain insurance in the appropriate amount as the Board determined.[39] This concern also does not warrant Commission review. The Board's order fully binds PFS. Because we see no suggestion of error in the Board's determination of the amount of insurance, we will not review it.

Finally, Utah wants a license condition requiring PFS to review its decommissioning costs annually. The Board found a specific license condition to be unnecessary, because the Commission's regulations already require a Part 72 licensee to conduct "periodic" reviews.[40] In addition, the Board found a license condition unnecessary because PFS had publicly committed to conducting annual reviews, and because its customers, by contract, would cover any

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[37] *See* CLI-01-09, 53 NRC 232, 236 (2001).

[38] *See* CLI-00-13, 52 NRC at 34-35 (Staff is allowed "room to exercise professional judgment").

[39] *See* PID-E at 100-101. Because PFS committed to pay **xxxx** per annum and obtain at least $70 million in insurance coverage, the Board ordered PFS to obtain insurance coverage of either $70 million or the amount that a **xxxxx** annual premium will obtain, whichever is greater.

[40] 10 C.F.R. §72.30 (b).

decommissioning funding shortfall.[41] In light of these considerations, the Board's ruling is appropriate.

3. The Model Service Agreement Does Not Satisfy Bases 1-10 of Utah E

Utah contends that the Board erred in finding that the model service agreement resolved the issues raised in its financial assurance contention (Utah E). Utah claims that the Board violated due process in refusing to reopen the record of the June 2000 hearing to address Utah's concerns with the model service agreement, and in denying Utah discovery.

The Board found that the standard for reopening the record was that the new evidence must "materially alter the outcome of the hearing." The Board found that Utah's concerns would not. The Board stressed that the subject of the June 2000 hearing was PFS cost estimates, not PFS's method of recovering those costs from its customers. The Board further ruled that the ambiguities Utah found in the model service agreements did not demonstrate that there were "relevant uncertainties significantly greater than those that usually cloud business outlooks" in the PFS business plan.[42]

Utah contends that because the model service agreement is so "lopsided and open-ended that no reasonable business would enter into them," PFS's business plan is completely unrealistic. Utah points out that no customer has yet entered into one of PFS's contracts. It also argues that the model service agreement is "illusory" and the NRC's financial assurance finding should be based on executed contracts.

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[41] *See* PID-S, slip op. at 45-47.

[42] PID-E, slip op. at 63-64, *quoting North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999).

Our decision in CLI-00-13 already addressed Utah's concerns that no customer will agree to the terms of the model service agreement. PFS cannot commence operations until funding is committed–that is, until long-term agreements are entered. Hence, if no customer enters into the service agreements, then PFS may not start up operations. The Board's ruling in PID-E also recognized this.[43] While it is evidently true that no customer has yet entered into a contract with the as yet unlicensed facility, this fact alone does not expose any weakness in the contract that would allow a customer to walk away from its spent fuel or payment obligations. Our decision in CLI-00-13 contemplated that financial assurance could be demonstrated by a *model* contract coupled with PFS's commitment to use that model. We see no reason to revisit that holding now.

The Board's decision not to reopen the record (or to restart discovery) correctly applied the standard for reopening a hearing record. It was also consistent with the Commission's direction in CLI-00-13 and NRC's financial assurance regulations. There is no need for further Commission review here.

4. Inadequacy of Model Service Agreement to Meet PFS's Costs.

Utah objects that PFS's financing scheme does not require it to have sufficient cash on hand to cover costs as they arise, creating the potential for PFS to risk safety to save costs. Utah faults PFS's proposal **xxxxxxxxxxxx**. Utah also contends that financing its operations

[43] *See, e.g.*, MSA Decision, slip op. at 76 ("And to the degree those provisions create questions about the extent to which PFS will be able to find customers willing to contract with it for SNF storage services under the MSA, LC-1 and LC-2 make it clear that PFS bears the risk that its funding design will leave it unable to attract a sufficient number of customers and so be unable to receive authorization to construct and/or operate the facility").

through service agreements is unreliable because it depends on the creditworthiness of PFS's customers.

The flaw in the scheme, as Utah sees it, is the likelihood that some of the customers that enter the service contracts will not pay their bills on time. Fundamentally, then, the "inadequacy" of which Utah complains is not with the model service agreement as written, but with the possibility that PFS customers will evade their contractual obligations.

The Board considered Utah's concerns, and found that PFS customers were reasonably creditworthy:

> [T]o the degree the State has concerns about continued customer viability in the context of facility operations and the concomitant lack of a large PFS cash reserve to address this purported (albeit somewhat overstated) problem, ... general, undifferentiated concerns about the future viability of PFS customers are not adequate to establish a lack of compliance with Part 72 financial assurance provisions, particularly when such concerns are expressed (1) relative to entities already subject to Part 50 financial qualifications requirements, ... and (2) in the face of MSA requirements for regular, quarterly payments of all PFS estimated costs ... [44]

In addition, the service agreements must have provisions requiring customers to periodically provide updated credit information and additional financial assurances.[45] In light of the Commission's prior approval of service agreements as evidence that PFS will have an adequate revenue stream, the Board did not err in accepting these particular service contracts as assurance of revenue.

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[44] MSA Ruling at 63-64 (internal citations omitted).

[45] A license condition will require the service agreements to include these provisions. CLI-00-13, 52 NRC at 36.

5. Board's Ruling Allows PFS to Avoid Showing Reasonable Financial Assurances Throughout the Life of the Facility

Utah complains that in allowing the passthrough contracts to substitute for estimating some costs, the Board ignored §72.22(e)'s requirement that the applicant must show "reasonable assurance of obtaining the necessary[] funds ... to cover ... [e]stimated operating costs over the planned life of the ISFSI." This, Utah says clearly requires that costs be estimated prior to finding financial assurance.

Utah argues that PFS has not demonstrated funding through the "planned life of the facility," because the Board found that the service agreements actually entered would only need to cover the O&M for the 20-year license term, not the facility's actual planned life of 40 years. Utah claims that the Board should not have halved the amount of costs that PFS needs to operate the facility through the anticipated 40 years of operation. But the Commission held in CLI-00-13 that service contracts should be in place to cover "the life of the license."[46] In addition, while PFS readily admits that it may seek to renew its license after 20 years, there is no certainty about that. PFS's continued existence will depend on a continued need for private away-from-reactor storage. If such a need develops, financial assurance for the renewal term will be an issue for the license renewal proceeding. It was not error for the Board to choose 20 years as the applicable term.

Utah also claims that the use of passthrough contracts directly violates the NRC rule, 10 C.F.R. §72.22(e), requiring reasonable assurance that it will "obtain" funds to cover estimated O&M costs. Utah claims that passing costs on to customers is not the same as "obtaining funds." But the Commission has already held, in this case and in *Claiborne* before it, that

[46] 52 NRC at 36.

having binding service contracts in place can provide reasonable assurance that the licensee will obtain the necessary funds. Again, this is not the time to relitigate issues settled earlier in this proceeding.

6. Board's Rulings Require Staff to Make Subjective, Non-Ministerial Post-Licensing Judgments

Utah complains that likely customer resistance to the "lopsided" service agreements will result in significant alterations, which in turn will require the NRC staff to make sophisticated legal judgments in determining whether PFS has complied with its license conditions. We reject this argument. First, it relies on the claim that PFS will violate its license condition by willfully redrafting the contracts to its own financial peril, which we find speculative. In addition, Utah's argument presumes that the NRC staff cannot be relied on to recognize a significant alteration in the contract that PFS has bound itself to follow. We already have discussed, in CLI-00-13, the scope of the NRC staff's post-licensing authority to review PFS's compliance with its license conditions.[47]

V. CONCLUSION

For the foregoing reasons, the Commission grants review of PFS's claims of error and denies review of Utah's claims of error. The parties are directed to file briefs, not to exceed 25 pages, on the two issues on which review is accepted. PFS should file its opening brief within 21 days of this order; the NRC staff and Utah should file their answering briefs within 21 days after receipt of PFS's brief. PFS may file a reply brief, not to exceed 5 pages, within 7 days after receipt of the staff and PFS briefs. The NRC staff may also file a short brief (not to exceed 10

[47] *See* 52 NRC at 34-35.

pages) in support of PFS in the facility size issue. That brief must be filed at the same time as PFS's opening brief.

All briefs should be served electronically. Any brief exceeding 10 pages shall contain a table of cases and authorities and a table of contents. Any interested *amici curiae* are authorized to file briefs as set out above, at the time of the party they support.

Finally, because today's decision discusses PFS's financial plan it contains proprietary information. The parties, may, if they choose, submit to the Commission a designation of appropriate redactions prior to our order's publication. We will withhold publishing for at least 14 days. If we receive any proprietary designation, we will redact the order appropriately prior to publication.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of March, 2004.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-04-27

MEMORANDUM AND ORDER
(Original Version Contains Proprietary Information)

This order addresses two issues concerning the financial assurance given by the applicant, Private Fuel Storage, L.L.C. (PFS), in this licensing proceeding. In CLI-04-10,[1] the Commission granted review of two findings in the Licensing Board's January 5, 2004, Memorandum and Order Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions[2] ("Reconsideration Ruling").

The first issue is whether, prior to beginning operations, PFS should be required to have service contracts in place with prices set in a specific amount as determined at the evidentiary

[1]Unpublished pending resolution of proprietary redactions issues. CLI-04-10 also rejected various challenges to the Board's financial assurance rulings. In today's decision we address PFS-proposed issues on which we granted review.

[2]Unpublished pending resolution of proprietary redactions issues.

hearing. The second is whether the service contracts must add up to an amount sufficient to fund operations for a full-to-capacity, 1000-unit facility.

We find that changes in PFS's financial plan make it appropriate to modify a financial license condition that the Commission imposed in 2000.[3] That condition directed PFS "not to commence operations before service agreements for the life of the license, with prices adequate to fund operations, maintenance, and decommissioning, in the amount to be determined at hearing, are in place."[4] We now find that if PFS's license is subject to the condition that it use "cost passthrough" service contracts, in substantially the form submitted to and approved by the Board, with respect to all fuel accepted for storage, then we are reasonably assured that PFS will have the financial means to safely operate and decommission the proposed facility. This modified condition allows PFS to use its Board-approved service contracts without redrafting them to state specific prices for storage services. The condition also allows PFS to commence operations without regard to the number of casks initially stored. Finally, the condition makes the obligation to use the Board-approved service contract a continuing one, so that all fuel will be covered by similar contracts throughout the PFS license.

Therefore, in light of changed circumstances, we modify our previous ruling as described above, and we vacate that portion of the Board's order requiring PFS to have service contracts with preset prices sufficient to cover operating and decommissioning costs for 1000 units.[5] Instead, we require that PFS enter service contracts covering all costs relating to the customers'

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[3] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000).

[4] *Id.* at 36.

[5] **xxxxxxxxx**.

spent fuel, including common expenses, throughout the storage term for all spent fuel accepted at its facility. If PFS's customers will not enter such contracts, PFS cannot accept their spent fuel.

I. BACKGROUND

The procedural history of the issues decided today is long and somewhat complex. We will summarize it briefly here. Utah first raised its concerns about PFS's financial assurance in its Contention E. In a March 2000 decision responding to PFS's summary disposition motion, the Board found that only two aspects of Utah E should proceed to hearing: the accuracy of PFS's operation and maintenance cost estimate, and the adequacy of its onsite liability insurance coverage.[6] In so ruling, the Board found that two license conditions proposed by the NRC staff provided reasonable assurance that PFS could meet the costs of operating its proposed facility. The first ("LC-1") would require PFS to have enough funds committed to construct the entire first phase of the project prior to beginning any construction. The second ("LC-2") would require PFS to have service contracts in place to cover operational, maintenance and decommissioning costs prior to accepting spent fuel for storage.

Utah objected that using license conditions in this manner effectively deferred PFS's financial assurance determination until after the license is issued, because PFS would not have the service agreements in hand until just prior to starting operations. Utah argued that financial assurance for construction and operations should not be subject to post-license verification, as opposed to pre-license proof. Noting Utah's objections, the Board referred to the Commission its ruling that these conditions provided reasonable financial assurance, and proceeded to hold hearings on the remaining aspects of Utah Contention E in June of 2000.

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[6] *See* LBP-00-6, 51 NRC 101 (2000).

In CLI-00-13,[7] issued after the Board's evidentiary hearings, the Commission substantially affirmed the Board's ruling, thus approving license conditions as a means for PFS to show financial assurance. But the Commission required PFS, on remand, to produce a model service agreement ("MSA") for the Board's review so that Utah could raise and litigate any deficiencies in the agreement's terms.[8] The Commission directed that conditions be included in PFS's license so that it was "not to commence operations before service agreements for the life of the license, with prices adequate to fund operations, maintenance, and decommissioning, *in the amount to be determined at hearing*, are in place."[9]

After the issuance of CLI-00-13, and prior to presenting the MSA to the Board, PFS revised its financing plan. The original PFS plan called for the customer to pay a basic storage fee, plus annual fees (with prices escalated according to designated inflation indices). Under the new financing plan, customers are to pay storage costs under so-called "cost-passthrough" contracts. These contracts would not establish set prices, but would require customers to pay PFS's costs. Utah moved to reopen the record of the June 2000 evidentiary hearings in light of PFS's new financial plan.

In May, 2003, the Licensing Board rendered three related decisions,[10] concluding that PFS had demonstrated reasonable assurance that it is financially capable of building, operating, and decommissioning the proposed facility, provided that it comply with the various license

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[7]52 NRC 23.

[8]CLI-00-13, 52 NRC at 35.

[9]*Id.* at 36 (emphasis added).

[10]Unpublished pending resolution of issues relating to proprietary information redactions.

conditions. In its Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), ("MSA Decision"), the Board concluded that the MSA would meet the financial assurance license conditions.[11] It also denied Utah's Motion to Reopen the Record, concluding that none of the matters raised by the state would materially alter the result of the hearings.[12] In its Partial Initial Decision (Contention Utah E/Confederated Tribes F, Financial Assurance), ("PID-E") the Board ruled that prior to beginning operations, PFS should have long-term service contracts in place with prices totaling the operating cost estimate for a 20-year license, as that amount was determined at the June 2000 hearings.[13] The third Partial Initial Decision ("PID-S") found reasonable assurance of decommissioning funding.

The source of the current dispute is the Commission's rephrasing of the license condition LC-2 to require service contracts "with prices adequate to fund operations ... in the amount to be determined at hearing."[14] The Board interpreted this phrase to mean that the contracts must state prices which add up to the estimated costs of running the ISFSI for the entire term of the license. Because the applicable regulation requires the licensee to identify how it will pay "[e]stimated operating costs over the planned life of the ISFSI,"[15] the Board at hearing determined the cost of operating the facility assuming it were filled to maximum capacity allowable under the license. That is, the hearing estimated the maximum possible operating costs. PFS interpreted the Commission's phrasing in CLI-00-13 as requiring only that the

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[11]MSA Decision, slip op. at 57-73, 80.

[12]*Id.* at 78-80.

[13]PID-E, slip op. at 95.

[14]CLI-00-13, 52 NRC 36.

[15]10 C.F.R. § 72.22(e)(2).

contracts would ensure that all actual costs related to operating the facility are covered, not to require contracts with prices adding up to the maximum possible operating costs.

At PFS's urging, the Board reconsidered its PID-E. The Board found that PFS need not have service contracts sufficient to cover the total operating expenses for a 20-year facility, but need only cover the costs of a full-to-capacity, 1000-unit facility.[16] The Board reasoned that PFS intended to build the facility in stages, with the first stage having a maximum capacity of only 1000 casks. The Board rejected PFS's argument that the cost-passthrough contracts eliminate the need to state specific prices in order to satisfy the conditions imposed by the Commission in CLI-00-13.[17]

PFS now asks the Commission to modify these conditions in two respects. First, it says that the cost-passthrough contracts are sufficient to show financial assurance without the necessity of naming a particular price in them. Including a set price in the service contracts is unnecessary and inconsistent with its overall financing scheme, PFS says. In addition, PFS argues that it does not need contracts to cover operating expenses for 1000 units to demonstrate financial assurance. Because the contracts require each customer to pay its share of the facility's fixed operating costs as well as per-unit costs, PFS says that it will recover all its necessary expenses regardless of how many casks are stored at any given time. Therefore, PFS argues there is no need to have, at the start of operations, contracts with prices totaling the operating expenses that would be incurred if the facility were filled to initial capacity (1000 units).

Utah opposes both of PFS's requests, arguing that they are inconsistent with our prior rulings and would undermine PFS's financial assurance demonstration.

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[16]Reconsideration Ruling, slip op. at 16-18.

[17]*Id.* at 12.

The NRC staff agrees with PFS that the Board's requirement for funding a 1000-unit facility is unnecessary. But the staff opposes PFS's argument seeking elimination of set prices in the service contracts. The staff takes the position that LC-2 should be revised to allow PFS to start operations as long as it has service contracts with prices equal to fixed costs plus per-unit costs for whatever the initial number of casks stored at the facility will be.

II. DISCUSSION

A. Financial Assurance Standards in Licensing Proceedings

The Atomic Energy Act authorizes the NRC to impose appropriate financial qualifications standards on licensees.[18] NRC requires a licensee to show reasonable assurance that it is able to handle the financial burdens of operating the facility for which a license is sought. For an ISFSI, the applicant must demonstrate that it

> either possesses the necessary funds, or that [it] has reasonable assurance of obtaining the necessary funds; or that by a combination of the two, the applicant will have the necessary funds available to cover the following:
> (1) Estimated construction costs;
> (2) Estimated operating costs over the planned life of the ISFSI; and
> (3) Estimated decommissioning costs ....[19]

If the licensee cannot handle the financial burden of construction, operating, and decommissioning costs, public safety could be compromised. The foundation of our financial assurance requirement is, therefore, to protect the public from radiological hazards that could

[18]Atomic Energy Act, § 182(a), 42 U.S.C. §2232(a). *See Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2) CLI-78-1, 7 NRC 1, 8-9 (1978).

[19]10 C.F.R. § 72.22(e).

arise if the licensee is not able to meet expenses.[20] It is not the NRC's duty or desire to micro-manage the finances of its licensees.

Using projections of future revenue is a typical method for license applicants to demonstrate that they can meet costs. In Part 50 reactor licensing cases, which have generally stricter financial requirements than that required for an ISFSI,[21] we require operating license applicants (other than utilities) to submit estimates for the first five years of costs, along with the source of funds to pay them.[22] In the case concerning the financial qualifications for the proposed Claiborne uranium enrichment facility under Part 70, the applicant hoped to use the license itself to attract investors.[23] There, we approved the license subject to conditions preventing the start of operations until the licensee had long-term contracts from potential customers. Thus, in cases where the applicant does not have cash in hand, we have allowed the use of license conditions to ensure that the licensee does not start operations without assurance of future revenues.

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[20] *See Gulf States Util. Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995).

[21] *See* CLI-00-13, 52 NRC at 30-31.

[22] 10 C.F.R. § 50.33(f)(2).

[23] *See Louisiana Energy Serv.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308 (1997).

B. Considerations Raised by PFS's Financial Scheme

1. Post-License Verification

Near the heart of the financial assurance inquiry is whether the staff will be able to verify that PFS has complied with the license conditions that are the foundation of its financial assurances. The reason the Commission in CLI-00-13 required PFS to produce its MSA to the Board was to simplify post-license verification. In this appeal PFS itself has raised the verification issue, arguing that if it uses its passthrough MSAs, it would be difficult for the staff to verify whether PFS had met the proposed license conditions as stated by the Board, which includes a "set price" requirement.[24]

Paragraph 4.79 of the Board's PID-E, prior to reconsideration, would have made verification a matter of adding up the prices specified in the existing service contracts to see if they total the estimated operating and maintenance costs:

> In conclusion, we find that in accordance with 10 CFR § 72.22(e)(2), PFS has reasonably estimated the costs of operation and maintenance over the forty-year planned life of the facility, with the exception of $... Tooele County, Utah host payment understatement. In accordance with the Commission's instructions in CLI-00-13, the Board finds that PFS may not commence operations before service agreements for the life of the license (*i.e.*, twenty years) are in place with prices adequate to fund operations, maintenance, and decommissioning in the amount of $... (to be escalated from 1997 dollars to present day value), plus $... for Tooele County host payments.[25]

On reconsideration, the Board found that it was bound by the Commission decision in CLI-00-13 to require PFS to have service contracts "with prices ... in the amount to be determined at [the] hearing" and that it had no authority to waive this requirement in light of PFS's new financing

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[24]Applicant's Brief on Review of Licensing Board Memorandum and Order Granting and Denying in Part Motion for Reconsideration and Clarification of Financial Qualification Decisions (April 14, 2004) ("PFS Brief"), at 2.

[25]PID-E, slip op. at 95 (footnote omitted).

scheme. But recognizing that requiring PFS to have contracts in advance to cover all costs of a full, 4000-unit facility was unfeasible, the Board softened the requirement by providing that PFS should only have to cover operating expenses of a **xxxxxx**-unit (**xxxxx** MTU) initial capacity facility, **xxxxxxxx**:

> In accordance with the Commission's instructions in CLI-00-13, the Board finds that PFS may not commence operations before service agreements for the life of the license (*i.e.* twenty years) are in place with prices adequate to fund operations, maintenance, and decommissioning for an initial **xxx** MTU capacity facility in the amount of $.... This figure reflects $... for cask, canister, and rail costs ($... per unit x **xxx** casks), plus $... for fixed and other O&M costs over a twenty-year license term, plus $... for Tooele County host payments. All costs are to be escalated from 1997 dollars to present value. Should the initial capacity of the facility as appropriately specified by PFS differ from **xxx** MTU, the above amount may be adjusted according to the actual number of casks to be used.[26]

With this modification, the NRC staff would still be able to verify that PFS has assurance of adequate revenues to cover operating costs, simply by adding up the contract prices.

The NRC staff argues on appeal that, because the Board recognized that it was possible to separate fixed costs from per-unit costs, LC-2 could be modified, consistent with CLI-00-13, to allow PFS to start as long as its service contracts will cover fixed costs plus per-unit costs. Post-license verification could be based on this formula. But the staff's solution does not resolve the problem that the contracts, which the Board found adequate, would have to be rewritten to include the figures that the Board came up with in the evidentiary hearing.

PFS argues that its contracts meet the Board's requirements because LC-2 as stated by the Board in its Reconsideration Decision merely required that PFS have contracts with "prices sufficient to cover" operations & maintenance costs. PFS's contracts will by definition meet those costs because the MSA defines its prices as equaling PFS's actual costs, PFS says. But

[26]Reconsideration ruling at 18 (footnote omitted).

as attractive as this argument is, it does not change the fact CLI-00-13 said that prices should be "in the amount to be determined at a hearing."[27]

We cannot fault the Board for sticking to the precise language of CLI-00-13, but we find that circumstances arising after that decision call for revising it. When CLI-00-13 was issued, PFS planned to use a fixed-price contract, making a license condition based on a fixed price sensible. The Commission decision did not anticipate PFS's change in approach. Considering that new approach now, we find it apparent that PFS designed its MSA to satisfy both the applicable NRC regulations and the intent, if not the language, of CLI-00-13's license conditions. Further, the Board was satisfied with the contracts. Given the change in the underlying facts, we find it appropriate to modify our previous directive concerning license conditions to specifically allow PFS to use its passthrough contract.

This solution also addresses the second problem PFS raises in its brief on review. PFS plans to build, in its first phase of construction, a facility potentially accommodating up to 1000 units. But it will not have 1000 casks onsite at the start of operations. It will take years to fill this phase to capacity. In fact, this phase might never reach full capacity--in which case PFS would never incur the related operating expenses associated with that many casks. It is not practicable to demand from PFS's first few customers that they execute contracts "with prices adequate to fund operations, maintenance, and decommissioning for an initial 10,000 MTU capacity facility," thereby footing the bill for future PFS customers (who may or may not ever come on board).

But when we eliminate the total figure up to which the contract prices must add, we also eliminate the need to pick a number of casks which the contracts must cover. Because the MSA

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[27]52 NRC at 36.

requires each customer to pay its *pro rata* share of fixed operating costs, PFS is assured of recovering its expenses even if the facility is not filled to capacity.

If we understand Utah's objection, it is that using contracts without demanding they cover the entire cost of a 1000-unit facility would potentially allow PFS to start operations with service contracts covering only the initial casks, but then accept additional casks without adequate service contracts in place. Utah proposes that if PFS is allowed to start operations with fewer than 1000 units, then its licensed capacity should be capped at the amount of that initial inventory (the amount subject to staff post-license verification).

Utah is right that if the finding of reasonable financial assurance rests on PFS's service contracts, then PFS cannot be reasonably assured of meeting "estimated operating costs for the planned life of the ISFSI" unless the license condition requiring PFS to use those contracts extends to all fuel it accepts at the facility. But instead of requiring PFS to have service contracts for all 1000 casks prior to the start of operations, we can reach the same result by modifying the license condition to require PFS to use its approved MSA for all fuel it accepts. This resolves the post-license verification issue as well as Utah's concern that PFS would accept more fuel after verification without adequate contracts. The NRC staff's task in post-license verification is also simplified, in that the staff no longer needs to "add up" the prices in the contracts to make sure they equal a particular amount. The staff need only determine whether an approved "cost passthrough" service agreement is in place.[28]

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[28]If in the future PFS changes its financial plan, and eliminates "cost-passthrough" contracts, it will have to seek a license amendment. In this regard, it is not the Commission's intent, in ruling on the acceptability of any given license condition, to forestall the Licensing Board's ability to determine the acceptability of an alternative method of meeting NRC financial assurance requirements that might be proposed by this or any other applicant. Our acceptance today of the applicant's porposed contractual format for providing financial assurance simply
(continued...)

2. Whether PFS Waived the Opportunity to Request Revision to CLI-00-13.

Utah claims that PFS has waived its opportunity to challenge the Board's ruling requiring it to have contracts in a specific sum and to ask the Commission to revise its directive in CLI-00-13. Utah points out that PFS asked for the first time in a motion for reconsideration, filed before the Board, that set prices be removed from the anticipated license conditions. According to Utah, this request came too late because, prior to its ruling in PID-E, the Board had explicitly invited the parties to discuss the impacts of CLI-00-13 on their already-filed proposed findings from the June, 2000 hearings.[29] In addition, Utah points out, PFS did not ask the Commission to reconsider CLI-00-13 pursuant to 10 C.F.R. §2.786(e), which provides that a party has 10 days after a Commission decision to do so.

Utah argues in effect that PFS should have realized within 10 days that a single phrase in CLI-00-13 would preclude it from using a passthrough-type contract. In Utah's view, PFS therefore should have either asked the Commission immediately to reconsider that phrase or abandoned the idea of using a passthrough contract.

The Commission reconsiders a decision where it has made a mistake of law or fact. "Reconsideration petitions must establish an error in a Commission decision, based on an elaboration upon, or a refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification."[30] Our rationale for modifying the license

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[28](...continued)
means that we find the proposal, subject to certain conditions we describe in this order, as one, but not the only, acceptable way to meet financial assurance requirements for this proposed facility.

[29]*See* Board Order (August 4, 2000)(unpublished).

[30]*Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), (continued...)

condition now stems not from a *mistake* of law or fact in the earlier decision but because the facts have *changed*. PFS now has a cost passthrough plan that was not before the Commission in CLI-00-13. Putting aside the fact that it would not necessarily be immediately apparent to PFS that the statements in CLI-00-13 concerning license conditions would preclude a passthrough contract, this was not the type situation where the Commission "reconsiders" its decision. We will not penalize PFS's failure to file a motion for reconsideration by refusing to allow it to use the Board-approved cost passthrough contracts.

Utah also argues that PFS should have moved for the Board to reopen the evidentiary record. But that would have been unnecessary, because the only new evidence relevant to this proceeding was the MSA itself, which the Commission required be submitted for the Board's, staff's and Utah's examination. We do not see that reopening the hearing record would be "[o]ne avenue for PFS to seek elimination of LC-2," as Utah has put it.[31] Whether the reference to "price" in CLI-00-13 is a requirement that shapes the MSA, or whether the form of the MSA can eliminate the requirement of "price," is a legal question, not a fact issue.

Utah also invokes the "law of the case" doctrine to argue that PFS cannot "relitigate" settled rulings. We find this doctrine inapplicable for two reasons. First, issues related to cost passthrough contracts were not decided in our earlier ruling. Rather, the issue before us in CLI-00-13 was whether a license condition requiring PFS to enter contracts would provide reasonable financial assurance. We decided that such contracts are permissible. We then asked the Board, on remand, to evaluate the adequacy of the particular contracts PFS planned

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[30](...continued)
CLI-02-1, 55 NRC 1, 2 (2002).

[31]Utah Brief at 10.

to use. We did not resolve a then-nonexistent controversy whether prices must be in a pre-determined amount or whether a description of costs covered by the contract would suffice. Because the issue of how PFS should bill its customers was not before the Commission at that time, the law of the case doctrine does not apply. In addition, Commission jurisprudence has long provided that various repose doctrines must give way where "changed circumstances" or "public interest factors" dictate.[32]

3. **Utah is Not Harmed by the Change in PFS's Pricing Scheme**.

We see no harm to Utah from either the change in PFS's pricing plan or the timing of that change. Utah has not shown that the MSA failed to include any costs that PFS is likely to incur. The point of requiring PFS to produce a model contract was to give Utah and the Board an opportunity to look for such deficiencies. Having already participated in a four-day evidentiary hearing on cost estimates, Utah should have had a good idea of the type of O&M costs PFS expects to encounter. In addition, PFS submitted a detailed description of every change in its financing plan from what was contemplated at the time of hearing and what was eventually reflected in the MSA.[33] Therefore, when presented with the MSA, Utah was in a good position to examine the MSA to see if there were any omissions.

Utah insists that a contract that does not set a price in advance for all services provides less assurance that PFS will meet expenses. On one hand, a contract that does not name prices may invite the customer to quibble over whether an expense was properly incurred. But

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[32] *Alabama Power Company* (Joseph M. Farely Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203, 204 (1974). *See Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 NRC 269, 283-84 (1992).

[33] *See* PFS cover pleading (Sept. 29, 2000), *and* Applicant's Identification of Additional Provisions that Embody Changes from Previous PFS Representations (Oct. 17, 2000).

on the other hand, contracts with flexible rather than set prices give better assurance against inflation and unexpected costs that might arise in the future. We find that the second consideration offsets the first. We agree with the Licensing Board that the MSA gives financial assurance comparable to that which would be given by a fixed-price contract.

We also see no harm to Utah from PFS changing in its pricing plan after the June 2000 hearings. The purpose of those hearings was to establish the costs that will arise as PFS operates and maintains the storage facility, not to determine how PFS will meet those costs. The Board's refusal to reopen the evidentiary record was grounded on this distinction.[34]

4. PFS Has Estimated the Costs of Operation as Required by NRC Regulations

Utah argues PFS's plan violates10 C.F.R. § 72.22(e), which contains a requirement that the licensee estimate costs. Specifically, our regulations require the license applicant to provide "reasonable assurance" that it can cover the "estimated costs" of operating and decommissioning the facility. We agree that this regulation requires that costs be estimated. Logically, the Licensing Board cannot find that a licensee is reasonably assured of meeting its "estimated costs" if it has no understanding of those estimates (*e.g.*, the kinds of costs) and how they are to be recorded. We found in *Claiborne Enrichment Center* that a reasonable cost estimate indicates that the licensee "understands its funding commitment and has seriously considered the factors that will contribute to the expense of the project it is undertaking."[35]

Utah's approach, however, appears to convert the need to estimate costs into a need for an NRC-imposed control on the prices the licensee will charge for its services. The Commission never intended in CLI-00-13 to dictate the prices in PFS's contracts to any extent beyond that

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[34]PID-E, slip op. at 78-80.

[35]*See* 46 NRC at 307.

necessary to offer reasonable assurance that PFS can meet costs over the life of its facility. The Board also found "nothing in the 'pass through' concept that is violative of the agency's financial assurance regulations."[36]

We do not agree with Utah that using the proposed MSA without including set prices allows PFS to avoid duties imposed by regulation, including the need to estimate costs. PFS provided information relevant to cost estimates at a four-day evidentiary hearing. The Board issued an order in excess of 100 pages concerning those costs.[37] The new financing scheme does not alter the costs, or the cost estimates, themselves.

Utah charges in its brief that removing the set prices from the proposed license condition would amount to a repeal of the regulation's requirement that costs be estimated. But the regulation only requires that the licensee show how it intends to pay for estimated costs; it never imposed a requirement that cost estimates be written into license conditions.

Utah also suggests that PFS is attempting to "evade" its responsibility to "estimate" costs so it can underfund construction and operating expenses in order to attract more customers. There is no logical connection between the passthrough contracts and PFS's supposed devious intent. Even if prices in service contracts were set by license condition, there is no guarantee that PFS would not cut costs on construction and operation and pocket the difference, assuming as Utah does that PFS has no compunction about compromising public safety.

In Utah's view, PFS can have no honest motive for changing from a set price contract to a passthrough contract. It argues that there "is no harm to PFS if the condition to estimate costs remains because the Board ruled favorably on its estimates." But there is possible harm to PFS

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[36]MSA Decision at 64.

[37]PID-E.

if its estimates are wrong. If PFS encounters unexpectedly high costs due to a surge in prices for one or another component of its facility, or increased labor costs, it could be stuck with a money-losing venture. On the other hand, if some costs go down (for example, if the maker of the casks PFS intends to use suddenly were to slash its prices), PFS would have to cut the prices for its services to remain competitive with on-site storage.

5. The Relevance of *Monticello*[38]

Utah argues that the Commission's ruling in the *Monticello* case is not reliable precedent for approving a passthrough contract because PFS's situation differs in a number of significant respects. In *Monticello*, NRC allowed the transfer of an operating license from an electric utility owner of the plant to its subsidiary, which would operate the plant. We found that a contract requiring the electric utility owner to pay all operating costs incurred by the non-utility operator was enough to establish the financial qualifications of the operator without further proof.

Utah points out three significant differences from the *Monticello*. First, Utah argues that NRC had direct regulatory enforcement power to ensure the owner of the plants in *Monticello* paid the operator, but here NRC will have no enforcement authority to ensure that PFS customers actually pay their bills. Second, in *Monticello*, the owner of the plants had a financial incentive to ensure that the operator of its plants was paid in a timely fashion, whereas PFS's customers have no similar incentive. Third, in *Monticell*o, there was an actual contract between the parties, rather than a hypothetical "model," on which NRC could base its financial assurance determination.

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[38] *Northern States Power Co.* (Monticello Generating Plant), CLI-00-14, 52 NRC 37 (2000).

We agree that the differences between the PFS situation and that in *Monticello* are considerable. But we do not base approval of the MSA as a means to show financial assurance on the similarities between PFS and *Monticello*. Rather we look at the PFS contracts themselves and ask if the issues Utah raises are enough to destroy our confidence in PFS's financial qualifications. We already approved PFS's use of service contracts in CLI-00-13 and the only question here is whether a passthrough contract will meet expenses as well as a fixed-price contract. We have allowed the use of service contracts to show financial assurance where the high level of assurance present in *Monticello* was not available, as we did, for example, with the Claiborne Enrichment Center.[39] The dissimilarities with *Monticello* to which Utah points are not enough to convince us that a passthrough contract will not offer adequate assurance.

We observe that Utah's first two concerns–lack of NRC enforcement authority and customers' lack of incentive to pay--would be present regardless of whether the service contracts in question are fixed-price or passthrough. In *Claiborne*, we found that the applicant appeared to be financially qualified on the basis of its promises, incorporated in license conditions, that it would not proceed until it had 5-year contracts that would cover construction and initial operating expenses. We did not base that decision on any direct enforcement authority to make the licensee's customers pay their bills.[40] Further, in *Monticell*o, the finding of financial assurance was based on the owner's contractual duty and presumed ability to pay

[39] *Claiborne*, 46 NRC at 304-306.

[40] We did note, however, that the staff's detailed technical review of applications, and the and the Commission's inspection and enforcement tools, provide further assurance that operation will not jeopardize public health and safety. *Claiborne*, 46 NRC 306-308.

(because it was an electric utility), not on any authority NRC might have had to force the owner to pay.[41]

Finally, we ruled in CLI-00-13 that the financial demonstration required of a Part 72 applicant was comparable to that of the *Claiborne* Part 70 applicant; that is, not as rigid as the standard used for a power reactor operating license as the one in *Monticello*.[42]

III. CONCLUSION

We find that PFS can demonstrate reasonable financial assurance so long as its license is subject to the condition that it use its MSA to cover all inventory accepted at the site.[43] This would make the obligation to use the approved contracts a continuing one, so that NRC staff could review the contracts at any time to ensure that PFS is continuing to comply with the license condition. This both satisfies PFS's need for flexibility and allows us to find that PFS "has reasonable assurance of obtaining the necessary funds" to cover "estimated operating

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[41] *See* 52 NRC at 48-50.

> [W]e find the detailed requirements of [Part 50] not "applicable" to [the operator] [based on:] (1) the nature of [the operator's] licensed activities–*i.e.*, operating the Prairie Island and Monticello plants, not funding them; (2) [the owner's] electric utility status; and (3) [the owner's] contractual commitment to assume full financial responsibility for funding the safe operation, maintenance, and decommissioning of the plants.

Id. at 50.

[42] 52 NRC at 29-31.

[43] We have no reason to believe that PFS is planning to use dissimilar contracts for later customers. It seems unlikely that PFS's initial customers would agree to the MSA as written without some assurance that subsequent customers would also shoulder their *pro rata* share of fixed costs, for example. But the literal terms of LC-2 as previously written referred to contracts at the start of operations, not subsequent contracts.

costs over the planned life of the ISFSI."[44] The Board's order requiring fixed prices in the service contracts and requiring sufficient contracts for a 1000-unit facility is *reversed*.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 7th day of October, 2004

[44] 10 C.F.R. §72.22(e).

REDACTED VERSION

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-05-01

MEMORANDUM AND ORDER
(Original Version Contains Proprietary Information)

Today we address numerous issues related to the disclosure or redaction of certain evidentiary and decisional material to which the Atomic Safety and Licensing Board referred in four as-yet-unpublished Memoranda and Orders in this independent spent fuel storage installation (ISFSI) licensing proceeding. Many of these issues reach us by way of cross-petitions for review of a March 31, 2004 Memorandum and Order (March 31st Order). In that order, the Board addressed various requests for either disclosure or redaction of certain financially-related information contained in the four prior orders of the Board. Similar issues stem from our own request that the parties indicate what information they believe we should redact from CLI-04-10 (an as-yet-unpublished Commission order accepting for review certain issues involving financial assurance).

REDACTED VERSION

Private Fuel Storage (PFS), in its Petition for Review, challenges the Board's decision not to withhold what PFS considers proprietary information concerning a settlement agreement between PFS and former intervenors Castle Rock Land and Livestock Company, L.C., Skull Valley Company, Ltd., and Ensign Ranches of Utah, L.C. (collectively Castle Rock). PFS also appeals the Board's refusal to withhold what PFS considers confidential information concerning PFS's Model Service Agreement (MSA), under which PFS would pass through all its construction, operating, maintenance, and decommissioning costs to its storage customers.[1] And last, PFS seeks Commission approval for additional redactions which PFS had not requested from the Board during the hearing.

The State of Utah opposes PFS's position on three grounds: PFS has failed to show competitive harm from disclosure; the requested redactions would distort the bases and effects of the underlying reasons upon which the Board and Commission relied in finding PFS financially qualified; and PFS's latest requests for redaction are untimely. In addition, Utah has filed its own Petition for Review in which it asks us to reverse every one of the Board's rulings granting redaction of information contained in the Board's four decisions. Utah and PFS have, between them, placed virtually the entire March 31st Order before us on appeal. Utah also seeks disclosure of similar information from various parts of the administrative record.

Finally, we have before us the parties' arguments as to what portions of CLI-04-10 (March 24, 2004) should be redacted prior to that order's release to the public. The parties' positions regarding redactions from CLI-04-10 echo their views concerning redactions from the Board's four orders.

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[1] *See* March 31st Order at 29-31.

Today, we affirm in part and reverse in part the Board's March 31st Order, and we rule on the disclosure or redaction of various kinds of information in the record and in the Board's and Commission's decisions. We also require PFS to prepare redacted versions of those documents, consistent with the rulings in the instant order. Finally, we provide for Board and Commission review of those versions, to ensure such consistency.

I. PROCEDURAL BACKGROUND

On March 31, 2004, the Board issued an order ruling both on Utah's two requests for disclosure of evidentiary materials[2] related to the "Financial Assurance" contentions (Utah E / Confederated Tribes F), and also on all parties' arguments regarding redaction of portions of four as-yet-unpublished Board Memoranda and Orders involving both the "Financial Assurance" contentions and the "Decommissioning" contention (Utah S).[3]

The Board addressed these requests and arguments by applying 10 C.F.R. § 2.790(a)(4), which provides that the agency will withhold from the public "commercial or financial information obtained from a person and privileged or confidential," and 10 C.F.R.

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[2] The materials are hearing transcripts, exhibits, pre-filed testimony and cross-examination plans. *See* unpublished Memorandum, "Notice Regarding Issuance of Decision," dated April 30, 2004, at 1-2.

[3] The Board issued three of these orders on May 27, 2003, and the fourth on January 5, 2004. To avoid confusion, we will refer to the three May 27th orders as follows:

Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13 [52 NRC 23 (2000)])	"MSA Order"
Partial Initial Decision (Contention Utah E / Confederated Tribes F, Financial Assurance)	"Financial Assurance Order"
Partial Initial Decision (Contention Utah S, Decommissioning)	"Decommis-sioning Order"

§ 2.790(b)(4), which sets forth five factors to consider in making such a determination. As for the information that the Board found "privileged or confidential," the Board then, under section 2.790(b)(5), balanced "the right of the public to be fully apprised as to the bases for and effects of [PFS's] proposed action" against "the demonstrated concern for protection of a competitive position." The Board redacted part of the evidentiary and decisional material at issue.

On April 15th, both PFS and Utah sought our review of the Board's March 31st order. On June 9th, we issued CLI-04-16 granting the two petitions and permitting the parties to file supplemental briefs.[4]

II. APPLICABLE LEGAL STANDARD

PFS seeks nondisclosure of various pieces of information on the ground that they constitute proprietary commercial information whose public release would harm PFS's competitive position. PFS relies on section 2.790 of our procedural regulations, which sets forth the standards for withholding information from the public in proceedings (such as this one) adjudicated under 10 C.F.R. Part 2, Subpart G.[5] Section 2.790(b)(4) sets forth five factors for the Commission to consider when determining whether information at issue is "confidential or privileged commercial or financial information:"

> (I) whether the information has been held in confidence by its owner;
>
> (ii) whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;

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[4] 59 NRC 355.

[5] Effective February 13, 2004, the Commission renumbered section 2.790 as section 2.390, but did not modify its language. Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2219, 2254-56 (Jan. 14, 2004). The revised procedural rules do not, however, apply in the instant case.

> (iii) whether the information was transmitted to and received by the Commission in confidence;
>
> (iv) whether the information is available in public sources;
>
> (v) whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.[6]

Applicants seeking redaction must address these criteria with specificity.[7] If the Commission determines that any of the information is in fact "confidential commercial or financial information," then the Commission must determine "whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position."[8]

This agency has produced scant jurisprudence applying section 2.790 to commercial or financial information. But that regulatory section embodies the standards of Exemption 4[9] of the Freedom of Information Act (FOIA),[10] so we look for guidance to the plentiful federal case law on that exemption.[11]

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[6] 10 C.F.R. §§ 2.790(b)(4)(i)-(v).

[7] 10 C.F.R. § 2.790(b)(1)(iii).

[8] 10 C.F.R. § 2.790(b)(5).

[9] *See General Elec. Co. v. NRC*, 750 F.2d 1394, 1397 (7th Cir. 1984).

[10] 5 U.S.C. § 552(b)(4). "It is not the Commission's intent to permit a greater degree of withholding of documents from public disclosure under § 2.790 than would be permitted under the Freedom of Information Act." Final Rule, "Restructuring of Facility License Application Review and Hearing Process," 37 Fed. Reg. 15,127 (July 28, 1972).

[11] This agency has similarly looked for guidance to federal court decisions involving (continued...)

Under Exemption 4, the current generally-accepted legal definition of "confidential" is information whose disclosure is likely to (1) impair the government's future ability to obtain necessary information, or (2) impair other government interests such as compliance, program efficiency and effectiveness, and the fulfillment of an agency's statutory mandate, or (3) cause substantial harm to the competitive position of the person from whom the information was obtained.[12] PFS raises only the third prong, so we need not reach the issue of a disclosure's adverse effect on the government. The federal courts have interpreted the third prong to require a showing of (a) the existence of competition and (b) the likelihood of substantial competitive injury.[13]

Federal court decisions are, however, divided on the question as to what constitutes "competitive injury." One line of cases concludes that such injury can flow from either competitors or non-competitors (such as customers and suppliers).[14] A second line of cases

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[11](...continued)
FOIA Exemption 5. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82,16 NRC 1144, 1163-64 (1982) (executive privilege). *See also* March 31st Order at 31 (considering two court decisions regarding Exemption 4 as "guidance").

[12] *See*, *e.g.*, *McDonnell Douglas Corp. v. National Aeronautics and Space Admin.*,180 F.3d 303, 305 (D.C. Cir. 1999), *reh'g en banc denied*, No. 98-5251 (D.C. Cir. Oct. 6, 1999); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993), *approving on this ground but rev'g and vacating on other grounds* 830 F.2d 278, 286 (D.C. Cir. 1987); *9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983).

[13] *See*, *e.g.*, *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976).

[14] *See*, *e.g.*, *McDonnell Douglas Corp. v. National Aeronautics and Space Admin.*,180 F.3d at 306, 307; *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d at 687; *Continental Oil Co. v. Federal Power Commission*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). *See generally* Final Rule, "Critical Energy Infrastructure Information," Order No.
(continued...)

interprets "competitive injury" more narrowly, limiting the phrase's scope to injury directly caused by a competitor's use of the information.[15] The Board in its March 31st Memorandum and Order adopted the narrower interpretation. As explained in detail below, we find the broader interpretation to be closer to the heart of Exemption 4 and 10 C.F.R. § 2.790, and thus we adopt it.

III. DISCUSSION

A. Existence of Competitors

As noted above, PFS's claim of "competitive harm" depends on a showing that it has competitors for its services. Three years ago, in *Utah v. Department of the Interior,* a FOIA case involving (among other parties) PFS and Utah, the Tenth Circuit considered this very issue and found expressly that "actual competition [for PFS] exists."[16] The court pointed to a PFS affidavit maintaining that "the storage of spent nuclear fuel 'is a competitive business.'"[17] In our case, the Licensing Board relied upon the Tenth Circuit's *Utah* decision to find sufficient "competition" to justify PFS's proprietary claim.[18]

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[14](...continued)
630, 102 FERC P 61,190, Appendix B, 2003 WL 21436754 at *29 (FERC) ("a submitter may be able to show competitive harm where use of the information by someone other than a competitor could cause financial harm to the submitter"), *reh'g denied and opinion modified on other grounds*, Order No. 630-A, 104 FERC P 61,106, 2003 WL 21716351 (FERC 2003).

[15] *See CNA Financial*, 830 F.2d at 1152; *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

[16] 256 F.3d 967, 971 (10th Cir. 2001).

[17] *Id.* at 970.

[18] *See* March 31st Order, slip op. at 15-17.

Ordinarily, under principles of collateral estoppel, losing parties are not free to re-litigate already-decided questions in subsequent cases involving the same parties.[19] But Utah argues on the current appeal that PFS's competitive situation has changed since the Tenth Circuit decision. Utah maintains that it now is clear that PFS has no competitors, and therefore PFS cannot be said to suffer a "competitive harm to [its] competitive position" from disclosing the information at issue here.[20] Utah chiefly relies on our own recent statement in CLI-04-10 that "PFS ... has no competitors now or in the foreseeable future for private, away-from-reactor dry storage."[21]

Utah puts more weight on the quoted language than it can bear. Our comment on "away-from-reactor dry storage" amounted to *dicta* supporting our view that PFS seemingly faces a more favorable competitive environment than another company, Louisiana Energy Services, with an analogous financial plan that we had also approved. Our comment did not announce a formal fact finding, resting on affidavits or record evidence, of changed circumstances. Thus it does not override the preclusive force of the Tenth Circuit's holding in the *Utah* case on the precise question – whether PFS has competitors -- at stake here.

In any event, our statement in CLI-04-10 was quite limited. We mentioned "private, away-from-reactor dry storage" only. We said nothing about onsite storage at reactors. The

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[19] *See Private Fuel Storage, LLC* (ISFSI), LBP-02-20, 56 NRC 169, 181-84 (2002) (discussing authorities). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 38 & n. 27 (1993). The collateral estoppel doctrine does not call for an inquiry into "the correctness of the prior decision." *See Private Fuel Storage*, LBP-02-20, 56 NRC at 182.

[20] *See*, *e.g.*, Utah's Reply to PFS's Supplemental Brief, dated July 16, 2004, at 1.

[21] Utah's Response to Applicant's Petition for Review, dated Feb. 2, 2004, at 7, quoting CLI-04-10, slip. op. at 12.

omission is significant, for even if, as we indicated in CLI-04-10, away-from reactor competitors are unlikely "now or in the foreseeable future," PFS faces actual (and potential) competition from numerous reactor licensees who are now using or are thinking about constructing their own onsite storage facilities.

Both Utah and the NRC Staff have long been aware of, and have repeatedly commented on, this particular source of competition.[22] The Staff's Final Environmental Impact Statement (2001) addressed -- seven times -- the issue of competition between PFS storage and onsite reactor storage.[23] And, prior to the filing of PFS's Petition for Review, Utah itself referred three times to this specific source of competition:

> PFS has an incentive to cut costs so as to retain existing customer business and to attract new business by offering fuel storage competitive with on-site dry storage.[24]
>
> [i]f PFS is granted a license for this facility, the only potential competitors to PFS may be the PFS customers who already have on-site ISFSIs.[25]

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[22] For this reason, we reject Utah's argument that PFS is improperly raising this argument for the first time on appeal. Utah's Brief on Financial Information, dated June 30, 2004, at 7.

[23] *See* NUREG-1714, "Final Environmental Impact Statement: for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County Utah," Docket No. 72-22 (Dec. 2001), at hyphenated pages 8-3, 8-10, G-415, G-416, G-422, G-426.

[24] Utah's Petition for Review of Contentions Utah E / Confederated Tribes F (Financial Assurance) & Utah S (Decommissioning), dated Jan. 15, 2004, at 16 n.29.

[25] Utah's Response to Applicant's Justification for Withholding Portions of Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), Partial Initial Decision (Contention Utah E/confederated Tribes F), and Partial Initial Decision (Contention Utah S) from Public Disclosure, dated July 14, 2003, at 6.

> [Referring to] the incentives PFS must offer customers if it is to be competitive with onsite storage.[26]

In short, treating onsite storage as a PFS "competitor" comes as no surprise. The record is replete with references to just that kind of competition.

Utah argues that the "onsite competition" argument comes too late. Utah points out that onsite storage was not the basis of the Board's decision on proprietary information, and was not argued by PFS until this appeal.[27] We reject Utah's timeliness complaint. As we explained above, the onsite competition point is hardly new to this litigation. It has come up repeatedly. Acting as an appellate body we are free to affirm a Board decision on any ground finding support in the record, whether previously relied on or not.[28]

B. Information regarding Castle Rock Settlement Agreement

The Board, in the Financial Assurance Order,[29] considered the issue of PFS's financial qualifications under 10 C.F.R. § 72.22 and, in that context, addressed the issue whether PFS had provided reasonable estimates of its construction and operating costs. Part of the Board's analysis of this cost issue concerned the costs stemming from PFS's settlement agreement with Castle Rock, a group of owners of land bordering on the PFS site. PFS had initially requested that the Board redact the information regarding the existence and terms of the

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[26] Utah's Response to Applicant's Petition for Review of Memorandum and Order Granting and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions at 6 n.12.

[27] Utah's Brief on Financial Information at 7.

[28] *See, e.g., Hertz v. Luzenac Amer., Inc.*, 320 F.3d 1014, 1017 (10th Cir. 2004); *Carney v. American University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998).

[29] Financial Assurance Order at 86, 92-93.

settlement, but it later reduced the scope of its request to cover only the terms, *i.e.*, **xxxxxx**.[30] PFS had argued that public disclosure of **xxxxxxxxxxx.** The Board, in its March 31, 2004 order, declined PFS's request. The Board reasoned that, although disclosure of the settlement-related information might cause PFS "financial" harm, the harm would not be "competitive," and would therefore not satisfy the fifth factor set forth in 10 C.F.R. § 2.790(b)(4) -- "substantial harm to the competitive position of the owner of the information."

On appeal, PFS argues (among other things) that disclosure would generally undermine parties' reliance on the confidentiality of the terms of their settlements, and would thus contravene the Commission's policy of favoring settlements of adjudicatory proceedings.[31] *Amicus Curiae* Castle Rock supports this argument, emphasizing that the confidentiality of the terms and conditions of the settlement agreement was and continues to be "of the utmost importance"[32] to it and that it "would have been reluctant to settle absent" such confidential treatment.[33]

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[30] *See* page 14, *infra*.

[31] PFS's Petition for Review, dated April 15, 2004, at 6; PFS's Supplemental Brief, dated June 30, 2004, at 2-3, 4-6.

[32] Motion by Castle Rock for Leave to File an *Amicus Curiae* Brief, dated June 30, 2004, at 2. We grant Castle Rock's Motion.

[33] *See Amicus Curiae* Brief of Castle Rock, dated June 30, 2004, *passim*, and particularly 5-8; Affidavit and Declaration of Christopher F. Robinson [on behalf of Castle Rock], dated June 30, 2004, at 3.

According to Castle Rock, the settlement included **xxxxxxxxxx.**. This **xxxxxx** is contingent upon the licensing and operation of the proposed PFS facility. Neither the terms of the settlement nor the March 31st Order refer to this **xxxxxxxxxx**[34] **xxxxxxxxx**.

We agree with the conclusion of PFS and Castle Rock. Section 2.759 of our procedural regulations stresses the important role settlements play in our adjudicatory program:

> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent it is not inconsistent with hearing requirements in section 189 of the [Atomic Energy] Act (42 U.S.C. [§] 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all the parties to those proceedings will take appropriate steps to carry out this purpose.[35]

Likewise, our decisions have consistently expressed our support for settlements.[36] Were we to disclose to the public the proprietary information from the PFS-Castle Rock settlement, we would not only undermine one of the principal grounds of that settlement, but we would also discourage parties from settling their financial disputes in the future, for fear that we would likewise publicly disclose the proprietary information in their settlements. This would, in turn, hinder the fulfillment of our statutory mandate to protect the public health and safety.[37]

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[34] *See Amicus Curiae* Brief of Castle Rock at 3-4, 6-8. The NRC Staff supports Castle Rock's assertions of competitive harm. *See* NRC Staff's Brief in Reply to PFS, dated July 16, 2004, at 3.

[35] 10 C.F.R. § 2.759.

[36] *See*, *e.g.*, *Sequoyah Fuels Corp. and General Atomics* (Gore OK Site), CLI-97-13, 46 NRC 195, 205 (1997), and cited authority.

[37] *See generally 9 to 5 Org.*, 721 F.2d at 10; *Public Citizen Health Research Group v. NIH*, 209 F. Supp.2d 37, 53 (D.D.C. 2002); *Nadler v. FDIC*, 899 F. Supp. 158, 162, 163 (S.D.N.Y. 1995), *aff'd*, 92 F.3d 93 (2d Cir. 1996).

Although we do not today take a hard-and-fast position that we will *never* reveal the contents of a confidential settlement agreement, we believe the circumstances of this case justify redacting from Board orders the contents of the PFS-Castle Rock settlement. The importance of honoring the settling parties' expectations of confidentiality is particularly strong in this proceeding because *both* parties to the settlement oppose disclosure of its terms on grounds of potential financial harm.[38]

We disagree with Utah that FOIA allows us no discretion to withhold **xxxxxxxxxxxxx**.[39] Settlement documents fall within the bounds of Exemption 4,[40] and federal courts have repeatedly refused disclosure requests where, as with Castle Rock and PFS, the information's release will harm the negotiating position of a party in any future **xxxxxxxxxx**.[41] Indeed, in a case involving both PFS and Utah, the Tenth Circuit refused (under FOIA) to order PFS to disclose to Utah its lease arrangements with the Goshute Tribe on the ground, inter alia, that

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[38] The law does not require certainty of injury in these situations; possibility of injury is sufficient. *See*, *e.g.*, *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d at 1291.

[39] Utah's Reply to PFS's Supplemental Brief at 4.

[40] *M/A-COM Info. Sys. v. Department of Health and Human Serv.*, 656 F. Supp. 691, 692 (D.D.C. 1986) ("it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required"). *Cf. Goodyear Tire & Rubber Co. v. Chiles Power Supply*, 332 F.3d 976, 983 (6th Cir. 2003) (recognizing a "settlement negotiation privilege," albeit not in a FOIA context).

[41] *See*, *e.g.*, *Flathead Joint Bd. of Control v. Department of Interior*, 309 F. Supp.2d 1217, 1221, 1222 (D. Mont. 2004); *Starkey v. Department of Interior*, 238 F. Supp.2d 1188, 1195 (S.D. Cal. 2002).

disclosure might weaken both PFS's and the Tribe's future bargaining positions.[42] (As noted above, the Tenth Circuit also found that PFS faced competition.[43])

The purpose of FOIA -- and section 2.309 -- "is not fostered by disclosure of information about private citizens ... that reveals little or nothing about an agency's own conduct."[44] Whether under FOIA or otherwise, the government need only disclose private parties' information if it "informs citizens about what their government is up to."[45] The settlement terms at issue in this proceeding shed little or no light on the NRC's conduct or decision. So when we balance the public's need for this information against PFS's and Castle Rock's need to keep the information out of the public domain,[46] the balance strongly favors the latter interest.[47]

Before leaving this topic, we need to address briefly Utah's remaining three arguments. Utah first directs our attention to the fact that the existence of the Castle Rock settlement is already public knowledge.[48] Utah's point, while correct as to the settlement's *existence*, is irrelevant to the issue of whether to redact the settlement's *terms*. PFS's and Castle Rock's principal concerns are not about public knowledge of the settlement's existence but rather

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[42] *Utah v. Department of Interior*, 256 F.3d at 970-71.

[43] *Id.*

[44] *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); *McDonnell Douglas Corp. v. Department of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004).

[45] *McDonnell Douglas Corp. v. Department of the Air Force*, 375 F.3d at 1193 (internal quotation marks omitted).

[46] 10 C.F.R. § 2.790(b)(5).

[47] *See generally Utah v. Department of the Interior*, 256 F.3d at 971.

[48] Utah's Response to Applicant's Petition for Review at 3 n.4.

about public knowledge of its **xxxxxx** terms.[49] In this regard, PFS points out that all of its current requests for redaction of references to the Castle Rock settlement relate solely to those terms.[50] Utah has not challenged PFS's statement.

Next, Utah points out that it seeks release of only **xxxxxxxx**, not the entire terms of the settlement.[51] The narrowness of the scope of Utah's disclosure request does not, in our view, determine whether we should disclose the **xxxxxxxx.** As discussed above, the public release of this **xxxxxxxx** could harm the future negotiating positions of the two parties to the settlement, undermine their joint expectation of confidential treatment, and weaken the confidence of future parties in the NRC's willingness to keep such settlement-related information confidential.

Finally, Utah contends that PFS has the option of keeping the Castle Rock information out of the public domain **xxxxxxx**, and that consequently PFS has failed to show competitive harm as required for redaction of information that the NRC requires an applicant to submit.[52] Again, we disagree. Under our regulations, the confidential treatment of settlement information does not turn on **xxxxxxx**.

For these reasons, we reverse the Board's rulings declining to redact from its orders information about the terms of the Castle Rock settlement.

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[49] *See*, *e.g.*, PFS's Petition for Review at 6 & n.15; PFS's Supplemental Brief at 2 n.7.

[50] *See* PFS's Supplemental Brief at 2-3 n.7. *See also* page 10, *supra*.

[51] Utah's Reply to PFS's Supplemental Brief at 4.

[52] Utah's Response to Applicant's Petition for Review at 9; Utah's Response to Applicant's Motion for Stay, dated April 20, 2004, at 6 n.14.

C. Information Regarding PFS's Model Service Agreement

Earlier in this proceeding, PFS had argued that the terms of its MSA provide reasonable assurance that PFS would have sufficient funds to build and operate its facility and meet the Commission's license conditions regarding financial assurance. The Board agreed,[53] relying in significant part on the fact that the MSA would pass all construction, operation and decommissioning costs along to PFS's customers.[54] The Board, in its January 5, 2004 order, declined to reconsider this conclusion.[55]

PFS then asked the Board to redact, for reasons of confidentiality, those portions of the Board's various MSA discussions that, according to PFS, revealed its intent to pass through 100 percent of its costs to its customers. PFS also argued that the Board's discussion of the Commission's decision in *Monticello* (where we had discussed an arguably analogous 100-percent cost passthrough arrangement)[56] would "strongly imply to a reader"[57] that PFS intended to adopt the same passthrough arrangement as in *Monticello*. PFS claimed that this revelation would provide its customers and vendors with unfair advantages over PFS in their negotiations with PFS, and would also harm PFS *vis - á - vis* any competitors who might seek

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[53] Financial Assurance Order at 67, 101-02.

[54] MSA Order at 59-60.

[55] Memorandum and Order (Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions) (Jan. 5, 2004) ("Reconsideration Order"), *rev'd*, CLI-04-27, 60 NRC ___ (Oct. 7, 2004).

[56] *Northern States Power Co.* (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37 (2000), *reconsid'n denied*, CLI-00-19, 52 NRC 135 (2000).

[57] Applicant's Motion for Stay, dated April 13, 2004, at 3. *See also* Applicant's Supplemental Brief at 6-8.

to enter the market and undercut PFS's prices for spent fuel storage.[58] The Board rejected this line of argument on the ground that its orders neither delved into the details of the MSA's cost passthrough terms nor suggested through its citations to *Monticello* that PFS was planning to use the same passthrough arrangement.[59]

On appeal, PFS acknowledges that, with a single exception, the Financial Assurance Order reveals no information that would cause PFS competitive financial harm.[60] However, according to PFS, the MSA Order and the Reconsideration Order do reveal PFS's intent to pass *all* its costs through to its customers. PFS asserts that this revelation stems from two features of those last two decisions: they discuss no funding mechanisms other than the MSA, and they also cite the Commission's *Monticello* decision dealing with 100-percent cost passthrough.[61]

As we noted above, federal courts have redacted commercial information under FOIA's Exemption 4 if the party seeking redaction can show both (a) the existence of competition and (b) the potential for competitive injury.[62] We require the same demonstration from parties who ask us to withhold purportedly "confidential or privileged commercial or financial information" pursuant to section 2.790. Although PFS has shown the existence of competition (*see* pages 7-

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[58] *See*, *e.g.*, PFS's Justification for Withholding Portions of the Memorandum and Order, dated July 3, 2004, at 2.

[59] March 31st Order at 31.

[60] PFS's Petition for Review at 4 n.11, 7-8 & n.16; PFS's Motion for Stay at 9, *as revised in* Clarification and Correction to Applicant's Motion for Stay, dated April 16, 2004, at 2.

[61] PFS's Petition for Review at 7-8.

[62] *See*, *e.g.*, *CNA Financial*, 830 F.2d at 1152; *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d at 679.

10, 10, *supra*), we conclude for the reasons given below (*see* pages 27-28) that it has failed to demonstrate the possibility of competitive injury from the public disclosure of PFS's 100-percent passthrough proposal. We therefore hold that citations to *Monticello* and information regarding PFS's 100-percent passthrough MSA should be publicly disclosed. At the same time, we hold that various specific aspects of PFS's financial arrangements are not suitable for disclosure and should be redacted.

1. Legal Definition of "Competitive Harm"

Utah asserts that injury suffered from suppliers and customers does not constitute "competitive harm" required under federal case law.[63] Utah acknowledges, however, that the federal courts are split as to "whether competitive harm must flow from use of information directly by competitors, or whether competitive harm can result from use of information by a business' customers, suppliers, etc., thereby damaging the position of the business *vis - á - vis* its competitors."[64] As noted at page 6, *supra*, there are two opposing lines of Exemption 4 decisions in which the federal courts (mainly the United States Court of Appeals for the District of Columbia Circuit) address this question.[65] Such case law, like Exemption 4 itself, provides us guidance, though it does not bind us in this area of law.[66]

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[63] Utah's Brief on Financial Information at 5-6 and n.10.

[64] *Id.* at 6 n.11. Utah asserts that this "competitive injury" issue becomes relevant only where an entity claiming confidentiality has already demonstrated "actual competition" -- something Utah claims that PFS does not have. *See id.* at 6. Given our finding above that PFS does have actual competition, we do not address Utah's assertion.

[65] The D.C. Circuit decisions carry particular weight regarding this issue because it oversees the United States District Court for the District of Columbia, which is the court of universal venue for FOIA cases. *See* 5 U.S.C. §552(a)(4)(B).

[66] *Shoreham*, LBP-82-82,16 NRC at 1163; *Wisconsin Elec. Power Co.* (Point Beach
(continued...)

A pair of District of Columbia Circuit decisions from the 1980s held that "competitive harm in the FOIA context ... is ... limited to harm flowing from the affirmative use of proprietary information *by competitors*."[67] But a 1999 case from the same Circuit appears incompatible with those earlier cases. In *McDonnell Douglas Corp. v. NASA*, the D.C. Circuit found in an Exemption 4 context that disclosure of government contract prices would harm the submitter of that information by permitting its "commercial customers to bargain down ('ratchet down') its prices more effectively."[68] In approving the rejection of a petition for rehearing *en banc*, Judge Silberman explained in a concurring opinion that, "other than in a monopoly situation[,] anything that undermines a supplier's relationship with its customers must necessarily aid its competitors."[69]

The result in *McDonnell Douglas* is consistent with the well-established rule that a company can demonstrate substantial harm to its competitive position without showing "*actual* competitive harm," *i.e.*, harm directly caused by disclosure of information to a company's

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[66](...continued)
Nuclear Plant, Units 1 and 2), LBP-82-42, 15 NRC 1307, 1316 (1982) ("Where there is a Commission regulation, duly promulgated, coexisting with other precedent in the general area, the regulation is controlling"). *Compare* 10 C.F.R. § 2.790(a)(4) & (b)(4) *with* 10 C.F.R. § 9.17(a)(4) (the Commission's regulation actually implementing Exemption 4 of FOIA). The latter regulation was promulgated to implement FOIA, while the former was not. *Kansas Gas and Electric Co.* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 415 (1976).

[67] *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d at 1291 n.30 (emphasis added). *Accord CNA Financial*, 830 F.2d at 1154 & n.158 (quoting *Public Citizen*).

[68] 180 F.3d at 306.

[69] United States Dep't of Justice, *Freedom of Information Act Guide & Privacy Act Overview* at 325 n.311 (May 2004), quoting *McDonnell Douglas Corp. v. NASA*, No. 98-5251, slip op. at 2 (D.C. Cir. Oct. 6, 1999) (Silberman, J., concurring in denial of reh'g *en banc*) .

competition.[70] Rather, all that is required under Exemption 4 is a showing that it faces both actual competition and a *likelihood* of substantial competitive injury.[71]

The D.C. Circuit is not the only court to conclude that "competitive harm" under Exemption 4 may come from sources other than direct competitors. The Tenth Circuit, in a case involving both PFS and Utah, has ruled that such injury may come from the use of the confidential information by "*suppliers*, *contractors*, labor organizations, creditors, and customers of PFS and the facility."[72] Analogously, the Second Circuit ruled that "[t]he fact that [the] harm would result from active hindrance by [an opposing citizens group] rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four."[73] And our own Licensing Board took the following similar position in 1988: "substantial economic harm to the information's owner may be protected under Exemption 4 even where no competitive position is at risk.... Exemption 4 is not by its terms limited to considerations of competitive harm."[74]

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[70] *Gulf & W. Indus.*, 615 F.2d at 530 (emphasis added).

[71] *See*, *e.g.*, *id.*, 615 F.2d at 530; *Niagara Mohawk*, 169 F.3d at 19; *Frazee v. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996); *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); *Public Citizen Health Research Group v. FDA*, 704 F.2d at 1291; *Public Citizen Health Research Group v. NIH*, 209 F. Supp.2d at 46.

[72] *Utah*, 256 F.3d at 967, 970-71 (10th Cir. 2001) (emphases added). Utah attempts to distinguish the Tenth Circuit decision on the ground that it involved an *executed* lease while PFS's MSA contracts have yet to be negotiated. We disagree. The Tenth Circuit's ruling did not rely on the executed nature of the lease when determining whether it should be disclosed.

[73] *Nadler*, 92 F.3d at 97 (2d Cir. 1996), *aff'g* 899 F. Supp. 158, 163 (S.D.N.Y. 1995).

[74] *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), LBP-88-8, 27 NRC 293, 299 (1988) (citation omitted).

2. Risk of Competitive Harm

Utah raises one general objection -- that PFS's evidentiary support of its claims of potential injury is too general to pass muster. We disagree. The affidavit and declarations from PFS's Chairman, Mr. John D. Parkyn, are as specific as the affidavit that the Tenth Circuit found sufficiently detailed in *Utah v. United States Dep't of the Interior*.[75]

We turn now to the question whether public release of certain *specific* categories of information from the evidentiary record and the decisions could result in a risk of competitive harm. Utah's challenges regarding redaction of evidentiary and decisional materials regarding competitive injury are largely the same, the Board responded to them in largely the same way, and the legal factors for determining whether to redact these two kinds of material are the same. Therefore, to the extent Utah's arguments concern information that appears in both evidentiary and decisional material, we treat them together.

Utah's lines of argument comprise a series of challenges to the Board's disclosure-related factual findings[76] -- an area in which we have traditionally deferred to the Board, and will reverse only if the findings are "clearly erroneous."[77] As we explained recently in *Tennessee Valley Authority*:

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[75] 256 F.3d 967, 971 (10th Cir. 2001). *Compare* the two affidavits (by Mr. Parkyn and Mr. Leon D. Bear) before the Tenth Circuit, appended to PFS's Reply to Utah's Objections, dated July 24, 2003, as Attachment D, *with* the affidavit and declarations of Mr. Parkyn, appended to Joint Filing of the Parties, dated July 3, 2003.

[76] *See* Utah's Petition for Review, dated April 15, 2004, at 2 ("The overarching concern raised below by Utah is for full disclosure of the Board's four substantive" orders).

[77] 10 C.F.R. § 2.786(b)(4)(i), *recodified at* 2.341(b)(4)(i), effective February 13, 2004 (Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2219, 2251 (Jan. 14, 2004)).

> We ordinarily defer to our licensing boards' fact findings, so long as they are not clearly erroneous. A clearly erroneous finding is one that is not even plausible in light of the record viewed in its entirety.... Although the Commission has the authority to reject or modify a licensing board's factual finding, it will not do so lightly. We will not overturn a hearing judge's findings simply because we might have reached a different result.[78]

The Board found that the release of four different categories of information appearing in both evidentiary and decisional material would impose on PFS specific risks of competitive harm. Those categories, which we address *seriatim*, are minimum capacity for the initial facility, bottom-line construction costs, categories of passthrough costs, and maximum onsite property insurance.

The Board concluded that release of the minimum capacity of the proposed PFS initial facility would result in competitive harm from potential competitors and customers.[79] According to the Board, not even Utah had suggested that PFS would suffer no injury from the revelation of this information.[80] On appeal, Utah neither contests this finding nor cites to any place in the hearing record where Utah makes such an argument.[81] We conclude, therefore, that the issue was not contested below, and that we do not need to reach it on appeal.

The Board next found that "disclosure of bottom line costs for each of PFS's three planned phases of construction would cause PFS substantial competitive harm from

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[78] *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 189 (2004) (footnotes, citations and internal quotation marks omitted).

[79] March 31st Order at 17.

[80] *Id.*

[81] *See* Utah's Brief on Financial Information at 11.

competitors and potential customers."[82] We accept the Board's conclusion that this cost information should not be released, though we disagree with one of the Board's two underlying justifications. As a matter of logic, we do not see how the revelation of these bottom line costs could harm PFS's negotiating position *vis - a - vis* potential customers. No potential customer could realistically be expected to agree to a "cost passthrough" agreement without knowing the amounts of those costs. Indeed, the MSA itself provides that customers may "reasonably request in writing information from PFS regarding the basis for and calculations of any invoiced amounts."[83] Consequently, PFS would have to reveal those costs when explaining the "cost passthrough" provisions of the MSA. To this extent, we disagree with the Board's finding.

But we still find that record evidence supports the Board's findings that a *prospective competito*r could use the estimates to determine the feasibility of constructing an ISFSI less expensively and hence undercut PFS's storage rates.[84] We affirm this portion of the Board's factual finding on grounds of deference and no clear error, and also on the additional ground that, as a matter of law, actual or potential competitive injury need not come from that particular competitor. It may come instead from prospective competitors who may be considering the construction of their own ISFSIs.[85] Any interest the public may have in this kind of cost information is easily outweighed by PFS's competitive interests. As the Board properly noted, Utah and the public have been given access to an "extensive amount of information, including

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[82] March 31st Order at 18.

[83] Model Agreement for Storage of Spent Fuel at 35, § 14.2.2, *attached to* Applicant's Motion for Summary Disposition, dated Dec. 4, 2000. *See also* Applicant's Submission of [original] Model Service Agreement, dated Sept. 29, 2000, at 31, § 14.2.2.

[84] March 31st Order at 18.

[85] See pp. 19-21, *supra*.

the imposed license conditions[,] ... the remaining unredacted portions of the evidentiary record[,] ...the capacity for each of the planned phases of construction [and, most important as to this particular issue,] the general methodologies and assumptions PFS relied upon in determining its cost estimates."[86]

The Board further found that "PFS would suffer competitive harm if competitors, vendors, suppliers and subcontractors learn which costs will be passed through to PFS customers," and that such categories of passthrough costs therefore constitute commercial or financial information protected under section 2.790(b)(3)(I).[87] The Board relied on a PFS affidavit stating that vendors, suppliers and contractors would "not be as competitive in the pricing of their own goods or services" if they learned of the relevant categories of passthrough costs.[88] The Board also relied on the affidavit's statement that "competitors could use such information to anticipate how PFS intends to structure its customer service agreements" and could "offer potential customers identical or more competitive terms."[89] We conclude that the Board's finding is supported by record evidence and not clearly erroneous, and further that PFS's interest outweighs that of the public.[90] We therefore affirm the Board's ruling.

We also find no clear error in the Board's fourth set of factual findings, concerning the maximum available onsite property insurance and PFS's response to future premium increases

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[86] March 31st Order at 22.

[87] *Id.* at 19-20.

[88] *Id.* at 19.

[89] *Id. See also* PFS's Motion for Stay at 6.

[90] March 31st Order at 22.

for that insurance coverage.[91] The Board's findings are supported by a PFS affidavit stating that competitors could use this information to either match or distinguish themselves from PFS's position when negotiating with potential customers.[92] We therefore find record support for, and no clear error in, the Board's finding of potential injury from competitors' knowledge of this information, and we defer to the Board's finding. We also agree with the Board that PFS's interest in confidentiality outweighs the countervailing public's interest.[93]

In addition to evidentiary and decisional discussions of the four topics discussed above, the Board also found that decisional discussions of four additional subjects should be exempt from disclosure: cost estimates, host facility cost information, current and obsolete funding plan information, and other MSA terms and conditions.

The Board declined to redact from its earlier orders information regarding the following cost estimates for a 4000-cask facility: total construction costs, total operating and maintenance costs over 40 years, total cask costs, and total canister costs.[94] The Board reasoned that PFS had not kept this information confidential, nor had PFS customarily held this kind of information

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[91] *Id.* at 20-21.

[92] *Id.* at 20.

[93] *Id.* at 22, 33-34. By contrast, the Board could find no record support for withholding information as to the course PFS would take if its intended insurance level cannot be maintained at the anticipated annual premium of **xxxxxxxxxxxx** (*id.* at 20-21, 32). But as PFS does not challenge this ruling on appeal, we do not need to reach it. In any event, our own review of the record likewise reveals no such support. *See* PFS's Justification for Withholding, at unnumbered pages 4-5; PFS's Reply to Utah's Objections, dated July 24, 2003, at 9.

[94] March 31st Order at 26-27.

in confidence, nor was this information unavailable from public sources.[95] The record supports the Board's findings. Even though this kind of information might well have otherwise qualified for confidential treatment, we agree with the Board that PFS's own actions and practice (publishing this or similar information on its website or newsletters) render redaction inappropriate here under the five-factor test of section 2.790(b)(4).

Next, the Board agreed to redact certain host-facility cost information from its prior orders. It ruled that PFS's host payments to the Skull Valley Band could, if released, be used against it in negotiations for service contracts and in the competition for customers. Unlike the 4000-cask facility costs discussed immediately above, information about PFS's host payments to the Skull Valley Band has never entered the public domain.[96] We concur in the Board's decision to redact this information, and also its conclusion that PFS's interest in confidentiality outweighs the public's interest in disclosure.

By contrast, the Board declined to redact certain calculations by Utah's expert indicating PFS's underpayment of its host payments to Tooele County. The Board could find no evidentiary references to, or justifications for, PFS's redaction request.[97] We might have approved a redaction of this information had PFS provided a proper basis in the record below (as it did provide regarding its information on host-facility payments to the Skull Valley Band). Nonetheless, given the absence of such record support, we must concur with the Board's finding.

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[95] *Id.* at 26-27.

[96] *Id.* at 27.

[97] *Id.* at 28.

The Board further found, regarding the current funding plan for the PFS facility, that PFS would suffer competitive harm if vendors, suppliers and subcontractors learned of PFS's intention, under the MSA, to **xxxxxxxxx** pass all its operating and maintenance costs along to, its customers.[98] PFS asserts that vendors', suppliers' or contractors' knowledge of the MSA's passthrough provision could easily result in their raising their prices, to PFS's disadvantage.[99] Although Utah raises contrary arguments specific to *individual* vendors and subcontractors,[100] we can resolve this issue without getting down to that level of detail.[101] Logic suggests to us that vendors and subcontractors will seek the highest prices they can get, *regardless* of the nature of the purchaser's or contractor's funding arrangements. Vendors presumably would assume that PFS intends to pass its costs on to its customers. It is not self-evident that revealing this aspect of PFS's plan would compromise PFS's commercial interests or bargaining position.

In any event, neither the Board nor PFS has offered a persuasive explanation as to how public knowledge of the cost-passthrough nature of PFS's funding plan would somehow place

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[98] *Id.* at 31.

[99] *See*, *e.g.*, PFS's Reply Brief, dated July 16, 2004, at 3. As noted *supra* at page 16, PFS makes a related argument regarding references to our *Monticello* decision.

[100] *See*, *e.g.*, Utah's Petition for Review, dated April 15, 2004, at 6-8, (regarding rail carriers and cask vendors); Utah's Reply to PFS's Petition for Review, dated April 26, 2004, at 7 n.16 (regarding same).

[101] We, like the federal courts, need not "engage in a sophisticated economic analysis of the substantial competitive harm ... that might result from disclosure." *GC Micro Corp.*, 33 F.3d at 1115. *Accord Utah*, 256 F.3d at 970; *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d at 1291. *See generally General Elec. Co. v. NRC*, 750 F.2d at 1403 (a proceeding on a request for information is not required to be as elaborate as a licensing or other formal proceeding"). *Cf. id.* (an NRC licensee need not make its case of substantial competitive harm with anything like the rigor that would be demanded of a plaintiff in an antitrust suit").

PFS in a more disadvantageous position *vis - á - vis* its vendors, suppliers and subcontractors than PFS would otherwise have been placed. Conclusory assertions in PFS's declarations and affidavits do not suffice. We therefore reverse the Board's refusal to release any discussion of PFS's intent to use a 100-percent cost-passthrough financing arrangement.[102]

We do not, however, reach a similar conclusion regarding PFS's earlier, now-abandoned funding plan (which is premised on a financial arrangement different from the 100-percent cost passthrough arrangement that supports PFS's current plan). Utah asserts that out-of-date information regarding this earlier plan should, due to its obsolescence, no longer be protected.[103] But even out-of-date financial information could arguably give competitors, vendors, suppliers and subcontractors useful information that they would use to PFS's disadvantage in future negotiations.[104] Conversely, such information will be of no use to the public in understanding whether PFS's *entirely different* funding plan satisfies our "financial assurance" requirements. The balance between these interests strongly favors those of PFS. We therefore affirm the Board's refusal to release PFS's older funding plan.[105]

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[102] March 31st Order at 31. For the same reasons, we affirm the Board's decision to release the various references in its orders to our *Monticello* decision (*id.* at 29-31).

[103] Utah's Petition for Review, dated April 15, 2004, at 10 & n.22. The out-of-date financial information was associated with a funding plan on which PFS was relying prior to its production of the current MSA cost-passthrough plan on Sept. 29, 2000. *See* Utah's Response to PFS's Petition for Review at 3.

[104] *See*, *e.g.*, *Timken Co. v. U.S. Customs Serv.*, 531 F. Supp. 194, 200-01 (D.D.C. 1981).

[105] *See* Utah's Petition for Review, dated April 15, 2004, at 10 n.22, citing Financial Assurance Order ¶¶ 3.46, 3.47, 3.72, 3.78, 3.81, 4.49, & March 31st Order, App. P, at 2-3, 9-10, 11-12 (in turn referring to MSA Order at 11, 12, 46-47, 61).

Finally, the Board found that PFS could suffer competitive harm from the release of the terms and conditions of its MSA other than the terms regarding **xxxxxxx** passthrough costs.[106] These "other" terms concern such matters as the service agreement execution / commitment fees,[107] the per Kg payments for Phase I of the project,[108] **xxxxxxx**,[109] and the amount of cash on hand prior to receiving spent fuel.[110] In support of its redaction ruling, the Board cited PFS's arguments that competitors and potential customers would have a significant competitive advantage during negotiations, and that potential competitors would likewise possess advantageous information.[111] For the reasons set forth above at page 23, we disagree with the "potential customers" portion of this finding (customers perforce will know the terms of the MSAs), but we uphold the "competitor" portion.

3. Balancing of Interests

We have conducted, *supra*, a balancing test for each kind of information that initially qualified as "confidential" under section 2.790(b)(4). We nonetheless believe further discussion of the balancing test is appropriate -- given the general nature of Utah's "balancing" argument, and particularly given the absence of prior Commission guidance on this topic.

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[106] March 31st Order at 33. On July 3, 2003, PFS filed with the Board a copy of the MSA Order on which PFS had flagged with the signal "***[6]***" all passages containing these "other" terms.

[107] *See*, *e.g.*, MSA Order at 13, 15, 20, 38.

[108] *See*, *e.g.*, *id.* at 17, 19, 30, 35, 41.

[109] *See*, *e.g.*, *id.* at 45-46.

[110] *See*, *e.g.*, *id.* at 28.

[111] March 31st Order at 33.

Once we have determined that much of a party's financial information is in fact proprietary, our regulations call on us to consider "whether the right of the public to be fully apprised as to the basis for and the effects of the proposed action outweighs the demonstrated concern for protection of a competitive position."[112] Utah argues generally that all the Board's redactions (as well as PFS's proposed additional redactions) would leave the public blind as to PFS's demonstrated compliance with 10 C.F.R. § 72.22(e) (financial qualifications) and the Board's and Commission's responses to Utah's substantive arguments that PFS is financially unqualified to own and operate the proposed ISFSI.[113] This result, according to Utah, undercuts its ability to represent its citizens and silences any public monitoring of "NRC's compliance with its regulations."[114]

We have stated that "[t]he public interest to be weighed in this balance has been narrowly defined as an interest in determining the bases for and results of agency action (*i.e.*, determining what the government is up to), and does not include incidental benefits from disclosure that may be enjoyed by members of the public."[115] Utah's general argument is essentially a restatement of this ruling. We conclude that, as a general matter, the balance favors withholding proprietary information regarding the kinds of financial issues discussed

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[112] 10 C.F.R. § 2.790(b)(5).

[113] Utah's Brief on Financial Information at 12-13.

[114] *Id.* at 13. *See also* Utah's Response to PFS's Motion for Stay at 6 ("misinformation remains in the public domain" and "the State will be harmed to the extent it must remain mute to PFS's public statements").

[115] Final Rule, "Availability of Official Records," 68 Fed. Reg. 18,836, 18,837 (April 17, 2003) (internal quotation marks omitted). Likewise, under FOIA case law, the first of these factors is *the only* public interest that may be weighed in the balance. *Public Citizen Health Research Group v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999); *Gilmore v. United States Dep't of Energy*, 4 F. Supp.2d 912, 922 (N.D. Cal. 1998).

above. Today, we have ruled consistent with this principle, with exceptions as specifically noted *supra*. During the half century in which we have been exercising this balancing test,[116] our weighing has been and continues to be informed by the "strong legislative policy against disclosure of proprietary information."[117] We also give considerable weight to the Staff's pro-redaction position which, in this proceeding, largely tracks that of PFS.[118]

It is important for nuclear industry participants to feel free to innovate (as PFS is doing in its ISFSI project), with no fear that the proprietary data associated with their innovations will casually be released to the public.[119] Indeed, Congress's purpose in enacting Section 103(b)(3) of the Atomic Energy Act[120] was "to protect the property right, the commercial right, which a

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[116] *Westinghouse Elec. Corp. v. NRC*, 555 F.2d 82, 87, 88 (3rd Cir. 1977).

[117] *Id.*, 555 F.2d at 87, 90-91. *See also id.* at 92 (referring to the "longstanding congressional policy which disfavors disclosure of proprietary information"); *Point Beach*, LBP-82-42, 15 NRC at 1315.

[118] See *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 399, *aff'd*, 4 AEC 409 (no CLI number) (Commission 1970); *Point Beach*, LBP-82-42, 15 NRC at 1319.

[119] *See generally Westinghouse Elec.*, 555 F.2d 82; *Point Beach*, LBP-82-42, 15 NRC 1307 (1982).

[120] This section (42 U.S.C. § 2133(b)(3)) provides that

> The Commission shall issue ... licenses ... to persons applying therefor ... who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

licensee as a developer of a new procedure, new idea, should properly have."[121] Finally, we observe that a great deal of safety- and environmental-related information from the record is already in the public domain. We believe that public release of the additional proprietary financial information we are withholding here would add little to the public's understanding as to the overall safety of the PFS facility -- particularly given that the financial information is of only derivative significance to environmental and safety issues.[122]

In short, even with the redaction of the additional material as required by this order, we would still concur in the Board assessment that Utah's position

> fails to give sufficient weight to the extensive amount of information that will be made available to the public, including the imposed license conditions and remaining unredacted portions of the evidentiary record. PFS has agreed to disclose the capacity for each of the planned phases of construction, which gives the public a fairly precise idea of the magnitude of the proposed facility. In addition the public record will include the general methodologies and assumptions PFS relied upon in determining its cost estimates. The redacted record thus will provide the public with sufficient balanced information to know the basis for our decision.[123]

C. Additional Requests for Redaction

PFS asserts that the five pieces of additional information for which it now, for the first time, seeks proprietary treatment are similar to proprietary information for which it has already sought redaction. PFS explains that it had inadvertently overlooked the additional information

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[121] *General Elec. Co. v. NRC*, 750 F.2d at 1401, quoting Hearings on S. 3323 and H.R. 8862 to Amend the Atomic Energy Act of 1946 Before the Jt. Comm. on Atomic Energy, 83rd Cong., 2nd Sess. 925 (1954) (remarks of Congressman Cole, the committee's chairman).

[122] *See* Final Rule, "Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants," 49 Fed. Reg. 35,747, 35,749 (Sept. 12, 1984); *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 236 n.8, 244 (1989); *Louisiana Energy Serv.* (Claiborne Enrichment Center) CLI-97-15, 46 NRC 294, 306, 308 (1997).

[123] March 31st Order at 22.

on **xxxxxxx** and passthrough costs until preparing its instant petition for review. PFS directs our attention to the large volume of material it needed to review and also to its good faith effort to apply the redaction criteria narrowly to that material.[124]

Before we reach the merits of PFS's request for additional redactions, we must first consider the procedural question whether PFS made this request before the proper forum. PFS acknowledges that, ordinarily, it would raise such a supplemental request initially with the Board rather than with us. However, given that the Commission currently has before it numerous other related issues, PFS asserts that administrative efficiency justifies our consideration of PFS's supplemental request. We agree, and will consider PFS's request.[125]

For this agency's adjudicatory system to work as designed, the parties must follow the Commission's procedural rules. One of those rules provides that "[a] petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer."[126] Of the five pieces of information at issue, PFS asked the Board to provide protected status for only one, regarding cost categories.[127] The Board did not rule on this request, but we conclude that the Board's rationale for approving the redaction of other cost category information (which we affirm today at 24, *supra*) is equally applicable to this similar piece of information.

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[124] Applicant's Supplemental Brief at 9-10.

[125] *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), ALAB-939, 32 NRC 165, 167 n.3 (1990). *See generally Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 101 (1983).

[126] 10 C.F.R. § 2.786(b)(5), *recodified at* 2.341(b)(5), effective February 13, 2004 (Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2219, 2251 (Jan. 14, 2004)).

[127] *See* Staff's Response to Applicant's Petition for Review, dated April 26, 2004, at 9 n.17.

As for the remaining four pieces of information, PFS has shown no good cause for failing to seek the Board's protection. Hence, we do not order this redaction. PFS's arguments (large volume of material, narrow application of redaction criteria) are so broad as to justify the late filing of redaction requests in just about any NRC adjudication involving large numbers of documents. For reasons of judicial efficiency, we decline to open that Pandora's Box. We find, therefore, that PFS has waived the redaction issue as to those four pieces of information.

D. Information contained in CLI-04-10 and CLI-04-27

On March 24, 2004, the Commission issued CLI-04-10 (as-yet-unpublished) granting PFS's petition for review of the Board's January 5th order and denying Utah's petition for review of portions of the same order as well as of two May 27, 2003 Board orders (the Financial Assurance Order and the Decommissioning Order). The issues on which we granted review (and sought appellate briefs) were whether PFS must have service contracts in place to cover operating and maintenance costs for a specific volume of spent fuel (1000 casks) prior to beginning operations and, if so, whether those contracts must be in a specific dollar amount in order to satisfy License Condition 17-2 (also cited as LC-2) approved in *PFS*, CLI-00-13. Because our discussion in CLI-04-10 regarding PFS's financial plan contained proprietary information, we gave the parties the opportunity to designate appropriate passages for redaction.

In response, PFS submitted proposed redactions.[128] Utah then objected to PFS's proposals on the grounds that the redactions related to published NRC decisional material -- the *Monticello* decision -- and destroyed the structure, accuracy, substance, and context of

[128] Applicant's Designation of Proposed Proprietary Redactions to CLI-04-10, dated April 13, 2004.

evolving agency precedent on financial assurance case law. Utah contended that PFS should not be allowed to rely on *Monticello* to support the "cost-plus" (*i.e.*, 100-percent cost passthrough, plus profit) basis of its license application, yet to seek simultaneously the redaction of references to *Monticello*-based "cost-plus" arguments in CLI-04-10. Also, according to Utah, CLI-04-10 may have generic implications for other proceedings dealing with financial qualifications issues. Utah grounds its legal arguments in 10 C.F.R. § 2.790 and FOIA's Exemption 4, discussed *supra*.[129]

We have already decided, *supra*, not to redact the Board Orders' citations to *Monticello*. Those rulings control as to CLI-04-10 as well. Also, we recently issued CLI-04-27 (addressing the merits of the parties "financial assurance" arguments) -- but after the parties had filed their appellate briefs regarding redaction. We nonetheless apply our rulings today to CLI-04-27, for the logic of today's rulings applies as much to CLI-04-27 as to CLI-04-10.

E. Future "Redaction" Proceedings

We issue the following instructions to PFS and the Board regarding redactions to the Board's five orders of May 27, 2003, January 5, 2004, and March 31, 2004, and also any briefs or evidentiary material in the record the disclosure of which has been contested in this appellate portion of the instant proceeding. PFS shall, within **60** days, provide the Board with redacted versions consistent with the rulings in the instant order.[130] We consider the Board better

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[129] Utah's Response to Applicant's Proposed Redactions to CLI-04-10, dated April 20, 2004.

[130] *See generally Point Beach*, LBP-82-42, 15 NRC at 1333 ("We shall call on Westinghouse to identify the text passages containing ... proprietary details and to delete only those details"); *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-62, 14 NRC 1747, 1765 (1981) (after ordering the public release of certain information, the Board stated that "[w]e consider it appropriate to direct Westinghouse to submit to us a new (continued...)

positioned than we are to make this initial review of PFS's proposed redactions of Board material -- given the factual nature of the redaction issues,[131] the Board's considerably greater familiarity with the adjudicatory record, and the Board's own authorship of the five orders.[132]

As soon as possible after receiving PFS's proposed redactions, the Board shall review the redacted versions of those documents to confirm their consistency with the rulings in the instant order. If the Board is satisfied, it shall issue a Notice authorizing the Commission's Office of the Secretary (SECY) to release such versions to the public immediately. If, however, the Board is not satisfied, then it shall issue an Order setting forth its modifications to PFS's proposed redactions, and shall attach what it considers to be appropriately redacted versions of the documents at issue. The parties may file petitions for review of such a Notice or Order within **15** days of its service. The filing of a petition will automatically stay the public release of the documents at issue in that petition, pending a Commission ruling. If no petitions are filed within the **15**-day period, SECY shall immediately release to the public the Board's redacted versions of the documents.[133]

We likewise instruct PFS to provide us within **30** days with redacted versions of the instant order, CLI-04-10, and CLI-04-27, consistent with the rulings in the instant order. If we

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[130](...continued)
non-proprietary version of its filing which conforms to this ruling"); *McCurdy v. Wedgewood Capital Mgmt. Co.*, 1998 WL 964185 (E.D. Pa. Nov. 16, 1998) ("because both parties suggest that the Court review any contested documents *in camera*, ... [d]efendant will be ordered to produce one set of the "redacted documents" ... in our chambers ... for *in camera* inspection").

[131] *See generally Point Beach*, LBP-82-42, 15 NRC at 1318, 1330.

[132] *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-00-25, 52 NRC 355, 356 (2000).

[133] This procedural approach is similar to the one taken by the Licensing Board in *Point Beach*, LBP-82-42, 15 NRC at 1337-38.

are satisfied, we shall issue a Notice authorizing SECY to release such versions to the public immediately. If, however, we are not satisfied, then we shall issue an order setting forth our modifications to PFS's proposed redactions, and we shall attach what we consider to be appropriately redacted versions of the three Commission orders. SECY shall then immediately release those versions of the three orders to the public.

ORDER

(1) The Commission *affirms in part and reverses in part* the March 31st order's rulings regarding disclosure of the information from our *Monticello* decision, PFS's MSA, and PFS's settlement with Castle Rock.

(2) The Commission further *directs* the Board and parties to follow the procedures set forth in Section E of the instant Memorandum and Order.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission

Dated at Rockville, MD
this 5th day January, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER (CLI-05-08) AS WELL AS REDACTED VERSIONS OF CLI-04-10, CLI-04-27, AND CLI-05-01 APPENDED THERETO, have been served upon the following persons by electronic mail or facsimile, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail. IN ADDITION, THE PROPRIETARY APPENDIX REFERENCED IN THIS ORDER IS BEING SERVED ON A LIMITED NUMBER OF PARTICIPANTS AS INDICATED BY AN ASTERISK (*).

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Docket No. 72-22-ISFSI
COMMISSION ORDER (CLI-05-08) AS WELL
AS REDACTED VERSIONS OF CLI-04-10,
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Docket No. 72-22-ISFSI
COMMISSION ORDER (CLI-05-08) AS WELL
AS REDACTED VERSIONS OF CLI-04-10,
CLI-04-27, AND CLI-05-01 APPENDED THERETO

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of March 2005